SUPREME COURT, U. S.

FILED
APR 19 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1296

LUPTON MANUFACTURING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, and CUPPLES PRODUCTS COMPANY, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Missouri

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Lupton Manufacturing Company, a curtain wall manufacturer, (hereinafter referred to as Lupton) appeals from the order of the United States District Court for the Eastern District of Missouri, made on January 13, 1967, denying Appellant's motion to intervene in this action. (Appendix A, *infra*). Appellant submits this statement to show that this Court has jurisdiction of this appeal and that the questions are substantial.

CITATION TO OPINION BELOW

The Memorandum opinion of the District Court denying the application of Lupton Manufacturing Company to Intervene, as well as corrections thereto, have been reported at 41 F.R.D. 342 (1967) and is reproduced herein as Appendix A, *infra*.

JURISDICTION

The Aluminum Company of America, hereafter referred to as Alcoa, acquired the Cupples Manufacturing Company, hereinafter referred to as Cupples, on January 22, 1960. In April 1961 the United States brought a civil action against Alcoa-Cupples in the United States District Court for the Eastern District of Missouri charging that such acquisition constituted a violation of Section 7 of the Clayton Act. On September 22, 1964, the District Court found such acquisition to be unlawful, *United States* v. *Aluminum Company of America and Cupples Products Corporation*, 233 F. Supp. 718, (1964), and ordered divestiture. On October 11, 1965, this Court granted the motion of the United States to affirm and affirmed the judgment of the District Court per curiam, *Aluminum Company of America, et al.* v. *United States*, 382 U.S. 12 (1965).

As of December 1966 divestiture had not taken place, but on the contrary Alcoa-Cupples were jointly conducting business activities. Lupton, after fruitless conferences with the Antitrust Division of the Department of Justice, filed a motion to intervene in the pending divestiture phase of this litigation under Federal Rule of Civil Procedure 24(a)(2) and 24(b)(2) in order to challenge the anti-competitive actions of Alcoa-Cupples, which not only threatened to frustrate the object of divestiture but also violated the provisions

of the District Court's decree (R. 6).[1] The District Court ruled from the bench (R. 263-264), denying Lupton's motion to intervene, and subsequently filed a Memorandum opinion, 41 F.R.D. 342 (1967), (Appendix A).

Notice of appeal was filed in the United States District Court for the Eastern District of Missouri on January 19, 1967 (R. 273).

Jurisdiction to review the action of the District Court is conferred upon the Court by 62 Stat. 989 (1948), 15 U.S.C. § 29. Jurisdiction is sustained by the following decisions: *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co. et al.* No. 9; *People of the State of California* v. *El Paso Natural Gas Co. et al.*, No. 5; and *Southern California Edison Co.* v. *El Paso Natural Gas Co.*, No. 24, — U.S. — Decided February 27, 1967. 35 L.W. 4227.

QUESTIONS PRESENTED

1. Whether the District Court erred:

A. In denying the Motion to Intervene filed by Lupton, under the provisions of revised Rule 24(a) of the Federal Rules of Civil Procedure.

B. In denying the Motion to Intervene filed by Lupton, under the provisions of Rule 24(b) of the Federal Rules of Civil Procedure.[2]

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[1] See also Supporting Memorandum (R. 10), Affidavit of Leonard Starr (R. 22) and Affidavit of Peyton Ford (R. 136).

[2] The question whether the District Court on the basis of the facts adduced at the Hearings of January 12, 1967 should have entered an order for the whole or part of the relief sought by the movant if it had been permitted to intervene has been subsumed in the discussion of the questions presented.

STATUTES AND RULES INVOLVED

STATUTES:

Expediting Act, 15 United States Code, Section 29, 32 Stat. 823 (1903), as amended 36 Stat. 1167, (1911); Section 7 of the Clayton Act, 15 United States Code, Section 18, 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950); Section 15 of the Clayton Act, 15 United States Code, Section 25, 33 Stat. 736 (1914), as amended, 62 Stat. 909 (1948).

RULES:

Rule 24(a) and Rule 24(b) Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Prior Proceedings

On April 27, 1961, the Department of Justice, on behalf of the United States as plaintiff, brought suit against Alcoa and Cupples alleging that the acquisition of Cupples by Alcoa violated the anti-merger provisions of the Clayton Act. The acquisition of Cupples, the number one fabricator of aluminum curtain wall, with 16.6 per cent of the aluminum curtain wall market, by Alcoa, the number one primary aluminum producer, was alleged by the Government to cause a substantial lessening of competition and to tend to create a monopoly by: eliminating potential competition in the architectural products field between Alcoa and Cupples; giving Cupples competitive advantages over fabricators not connected with integrated primary aluminum producers; and possibly foreclosing sales of primary aluminum by Alcoa's competitors to Cupples (subsequently abandoned). *United States* v. *Aluminum*

Company of America, 233 F. Supp. 718 (D.C. Mo. 1964).

On July 30, 1962, a preliminary injunction was issued by the District Court prohibiting Alcoa and Cupples from further consolidating or commingling business assets or personnel, such order specifically enjoining them, *inter alia,* from any further consolidating or commingling of any business assets, financial, good will, personnel or otherwise; requiring Cupples to continue to exercise independent judgment and activity in its operations; requiring Alcoa-Cupples to continue to publicize distinctly the name of Cupples in connection with products Cupples manufactures and to make no more pronounced indication of Cupples' affiliation with Alcoa than existed in the exhibits before the Court at the time of the injunction; requiring the maintenance of separate pension plans and separate sales organizations; restraining defendants from transferring any Cupples employees to Alcoa and restraining Alcoa from employing any of Cupples' employees; and requiring that products manufactured in the Corona, California, plant be Cupples' products and that they be sold and advertised as Cupples' products (R. 1).

On September 22, 1964, the District Court determined that Alcoa's acquisition of Cupples was in violation of Section 7 of the Clayton Act. In the Court's opinion, reported at 233 F. Supp. 718 (1964) certain specific findings were made which are relevant and important in the present proceeding.[3] Alcoa, the Court found, had acquired Cupples with the avowed purpose of obtaining forty per cent (40%) of the aluminum

[3] A table of these findings is set forth in Appendix B, *infra.*

curtain wall business, and Alcoa had the power to achieve its goal. *Id.* at 729-730. The Alcoa-Cupples combination possessed an overpowering competitive leverage which could be exercised whenever necessary to exclude the non-affiliated competitors of Cupples. Alcoa would be able, whenever it chose to do so, to operate Cupples on a break-even basis or even a loss basis and still make a profit on the aluminum sold by Alcoa to Cupples so that there would be profit on the overall operation. *Id.* at 727-728.

The Appellant

Appellant Lupton Manufacturing Company (formerly Michael Flynn Manufacturing Company), is the successor to David Lupton's Sons Company, a metal window manufacturer and a Pennsylvania corporation with its principal place of business in Philadelphia. Since 1953 Lupton has been continuously engaged in the manufacture and installation of curtain walls, including, since 1954, curtain walls for numerous high-rise office buildings in New York City. The New York City market represents about 60 per cent of the national total of curtain wall construction (R. 22).

The Facts Which Occasioned the Need for Intervention

The Court's Final Judgment filed December 4, 1964, required Alcoa to submit within 60 days a plan for accomplishing the required divestiture of Cupples (R. 4). Paragraph 5 of the Court's order (R. 4) incorporated an earlier order described above which enjoined the defendants *pendente lite* from any further consolidation or commingling of assets, personnel, pensions plans and advertising (R. 1), and required spe-

cifically that Cupples exercise independent judgment and activities in its operations (R. 1).

On February 18, 1966, the District Court approved Alcoa's plan of divestiture.[4] In November 1966, Alcoa submitted a report stating that as yet no buyer had been found for Cupples (R. 283).

During all this time and beginning in October 1963, while the litigation was pending, Alcoa and Cupples were developing a proposal to The Port of New York Authority* to erect the aluminum curtain wall on the proposed World Trade Center Building (R. 214-218). See *United States* v. *Aluminum Company of America*, 41 F.R.D. 342 at 343. This project embraces two huge towers, each having a base dimension of 200 feet by 200 feet, and rising 110 stories or approximately 1500 feet. The construction represents the tallest buildings in the world and will dominate the New York City skyline. *Id.* at 343.

In December 1966, Alcoa submitted a bid to The Port of New York Authority to be carried out by and through Cupples which would link the two companies together for many years in the future (R. 218). Lupton also submitted a bid on December 2, 1966, as required by the invitation documents (R. 24). Unlike Lupton's bid however, Alcoa's represented that the major part of the work would be performed by Cup-

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[4] The Government notes this fact in its memorandum dated March 31, 1967 (S.R. 1).

* The Port of New York Authority is an agency established by virtue of compacts between the states of New York and New Jersey and approved by the Congress of the United States.

ples (R. 24, 218).[5] The requirements of the proposal demanded that the successful bidder guarantee the work for a period of twenty-five years (R. 107). The requirements further provided that any subcontractor was made the express agent of the successful bidder who was to be responsible for the successful completion of the project (R. 42).

It appears in the record that Alcoa has never fabricated a metal curtain wall (R. 24). See also *United States* v. *Aluminum Company of America*, 233 F. Supp. at 721. Alcoa used the personnel and the facilities of its subsidiary, Cupples, to design the curtain wall and to assist in the preparation of the quotation and in various presentations to the Port of New York Authority and to the architects (R. 25-26). Indeed, on the date of delivery of the bid, personnel from both Alcoa and Cupples were present together at the Port of New York Authority (R. 24, 241, 242). It was developed in some detail at the hearing on intervention that Cupples had been assisting Alcoa in the preparation of this project well over two years. After the submission of Alcoa's initial bid, personnel of both Alcoa and Cupples worked both separately and in concert to obtain this contract with the Port Authority. Such post-submission activity included a modification downward of the initial Alcoa bid, after Lupton's bid had been submitted[6] (R.251, 252). It is interesting to consider the testimony of Cupples' officials on this modification.

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[5] Mr. Leonard Starr testified under oath that Lupton did not learn of the cooperation between Alcoa and Cupples until November 1966. (R. 256, 257) See also Exhibit 4 (R. 265).

[6] Denial of intervention made it impossible for appellant to develop through discovery the circumstances surrounding this modification.

President Charles Moran stated he knew and agreed to the modification (R. 251, 252) whereas the chief engineer Mr. Davis had no knowledge of any bid reduction (R. 242) and Executive Vice President Roger Lord testified that the bid had not been changed at any time to his knowledge (R. 245-246).

On January 24, 1967, some eleven days after the Court's memorandum opinion denying Lupton's intervention, the Port Authority announced that Alcoa had won the $21,250,000 contract to fabricate and erect the aluminum curtain wall and that Alcoa would assign the work to Cupples Products Corporation.

Under the invitation to submit bids and the proposed contract, curtain wall installation will start January 1969 and will require approximately two years to complete, a total of almost four years from the date when intervention was sought (R. 46, 47).

The low bid submitted by Alcoa has not been shown by the Government or Alcoa to be profitable for Cupples, rather than for Alcoa in supplying the necessary primary aluminum. During the four year period required for completion of the curtain wall contract, Alcoa and Cupples will have to continue to maintain the closest kind of cooperation and exchange of information (R. 245, 249-250).[7] The effect of this on the prospect of divestiture was not investigated by the Court on the basis of facts put on the record by knowl-

[7] Alcoa has enlisted the services of Cupples personnel for the solution of the engineering design (R. 235, 236), finishing and fabrication problems associated with this project (R. 242, 243), and in fact, Alcoa's proposal could not have been prepared nor could Cupples have prepared an acceptable proposal, had they been invited to do so, without the closest kind of cooperation between Alcoa and Cupples (R. 25, 26).

edgeable people. The Court had only the opinions of counsel for the parties on this subject, opinions which coincided.

All of the parties to the action resisted Lupton's requested intervention. None of the parties however, introduced any evidence either by way of rebutting Lupton's affidavits or the witnesses called by Lupton at the hearing on the motion. Indeed, none of the parties availed itself of the right to cross-examine any of the five witnesses called by Lupton. Rather, each relied on their written briefs and argument of Counsel.

The Department of Justice took the position that it had investigated the matter and was taking the steps it deemed necessary to assure compliance. It was asserted that the proposed terms of arrangements between Alcoa and Cupples had been reviewed and "they are not, on their face at least, disadvantageous to Cupples." (R. 187) The Department stated it was continuing to investigate the matter and had already required certain corrective action to be taken. A "series of commitments" (R. 186-187) had been secured from Alcoa designed to prevent Alcoa's acquiring, by reason of the contract, any good will belonging to Cupples. These commitments were represented to include the assurances that Alcoa would assign the contract to Cupples and that Alcoa would not advertise or represent that the contract was secured on the basis of its own expertise in the curtain wall field (R. 187). These commitments were not, however, filed with the Court or made a matter of record beyond the meager description of them by Counsel. The Court did not require that they be made a part of the record (R. 210-211). Lupton had no opportunity to examine

them and inquire into their scope, qualifications, meaning and effect.

The testimony presented by Lupton was met by nothing more than the naked assertions of counsel, who made many allegations of fact, not verified or supported by any papers other than the argument and defense briefs.

Judge Meredith, in denying intervention by a ruling from the bench (subsequently he filed a Memorandum opinion, Appendix A), stated in essence that "the Antitrust Division of the Justice Department has diligently protected the interest of the Public," *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342, 343, and that "there was considerable authority to support the view that no one other than the Government should be permitted in this law suit at this time, and none to support intervention," *Id.* at 344, citing among other authorities *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961) and *United States* v. *El Paso Natural Gas Co.*, 37 F.R.D. 330 (1965).

THE QUESTIONS ARE SUBSTANTIAL

Two fundamental questions are presented for the Court's scrutiny. The first question relates to the proper interpretation of the recent amendments to Rule 24(a)(2) as they relate to the quality and nature of the interest a proposed intervenor must have relating to the "property or transaction" which is the subject matter of the action involved, as well as, the burden of proof that the would-be intervenor must bear in relation to the issue of adequacy of representation. The second question involves the right of members of the competitive class determined to be endangered by

an unlawful acquisition to press for speedy and effective divestiture, as well as appropriate injunctive safeguards pending such divestiture.

The importance of the procedural questions is intensified by virtue of their being intertwined with the problem of effective enforcement of Section 7 of the Clayton Act. Effective enforcement is not achieved merely by obtaining a favorable judgment and decree of divestiture, which can become emasculated if prompt divestiture is not pressed for by the Department of Justice and insisted upon by District Judges. The relief stage of fully adjudicated merger cases cannot be suffered to become unsafeguarded bargaining sessions between the Department and unsuccessful defendants to reach compromises at this terminal stage of long litigation, built upon acceptance of unilateral acts like the Alcoa-Cupples long term contract with the Port Authority of New York. Otherwise, there is the danger of undermining and frustrating the aims and objectives of Section 7.

The fact that divestiture may be difficult and in some cases take considerable time to accomplish accentuates the need for effective injunctive relief, enforced by the District Courts, pending the achievement of a divestiture which has been decreed. The matter now before this Court demonstrates what follows from the lack of appropriate safeguards, when defendants are suffered to continue joint business activities of the type previously adjudged to be anticompetitive, with the acquiescence of the Department of Justice, *activities which would be no different if the defendant had won the Section 7 case.*

THE DISTRICT COURT ERRED IN DENYING THE MOTION TO INTERVENE FILED BY LUPTON PURSUANT TO THE PROVISIONS OF RULE 24(a) AND 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Right To Intervene Under Rule 24(a)

In seeking intervention appellant relied upon the modification of Rule 24 which liberalized and broadened the right to intervene and which eliminated the restrictive standards which were the lodestar of the decision in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961). That such liberalization was intended is disclosed by the changing of the wording of the rule.[8] It is further borne out by the Advisory Committee's Notes which criticized the results of the *Sam Fox* standard, and spelled out the intended relationship with amended Rules 19 and 23. Additionally the amendment reflects, when read in conjunction with the Committee's Notes, that practical considerations were to be of paramount importance. Thus:

> A class member who claims that his 'representative' does not adequately represent him, and is able

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[8] (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the [representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof.] *applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.* (Italicized portion represents the amendment; the language in brackets has been deleted.)

> to establish the proposition with *sufficient probability* . . . should as a general rule, be entitled to intervene in the action. (emphasis added.)

At the hearing on its motion to intervene Appellant established by unrefuted affidavits and testimony all of the elements necessary to present a *prima facie* right to intervene. The District Court, however, concluded that the amendment to Rule 24 in no way altered the *Sam Fox* standard and cited *United States* v. *El Paso Natural Gas Co.*, 37 F.R.D. 330 (1965) as recent authority for the Federal Government's right to resist interveniton in Section 7 actions. The Court further stated "that there was considerable authority to support the view that no one other than the Government should be permitted in the law suit at this time, and none to support intervention." Citing *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (E.D. Pa. 1960). *United States* v. *Aluminum Company of America*, 41 F.R.D. 342 at 344.

The decision of the Court in the *R C A* case related to a consent decree and is so distinguishable from the instant as to be of no precedental value. This Court on February 28, 1967, reversed the *El Paso* decision and determined that intervention under Rule 24 would be permitted in the relief stages of a Section 7 case. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co. et al. supra.*, The Court held that a distributor of natural gas whose interests would be adversely affected by the enforcement of a divestiture decree had standing to intervene under amended Rule 24 to protect such interests. The presence of Government representation was not considered an absolute bar to Cascade's intervention. On the contrary, the action of the Government in bargaining with the de-

fendants in order to facilitate divestiture was viewed as inherently inimicable to the interest of Cascade.

The Government's acquiescence in the combined efforts of Alcoa-Cupples in obtaining the Port of New York Authority contract cannot but be viewed as harmful to the interest of Lupton in the achievement of timely, effective divestiture. Indeed the record is replete with unrebutted testimony disclosing actions on their face dangerous to the interest of Lupton and dangerous to the public interest. In *United States* v. *Terminal Railroad Association of St. Louis*, 236 U.S. 194 (1914) this Court noted with approval the right to intervene when an order of the Court on its face was or could be considered harmful to the intervenor. Certainly the language of amended Rule 24(a) embodies this concept in providing for intervention where "the disposition of the action may as a practical matter impair or impede his ability to protect that interest."

Counsel for the Department of Justice advised the District Court on January 12, 1967, that the Department viewed the continued joint business relationship of Alcoa-Cupples as simply Alcoa helping Cupples by building it up and thereby making Cupples more "divestible." (R. 208-209) The Government further apparently was not concerned because "The date for divestiture, of course, is February 1, next, so that divestiture should be taking place, and we certainly expect that it will be taking place very promptly. Therefore, this situation will not endure and should not endure very much longer." (R. 209).

However, Alcoa had not found a purchaser for Cupples by negotiations over many months and at this time had been advertising Cupples for sale in the press. As

far as the record shows no prospective potential purchaser had turned down Cupples because it lacked a big long-term contract like the Port Authority's. Nothing in the record discloses that on the basis of expert judgment such a contract would make Cupples more "divestible" rather than less so by reason of continued ties to Alcoa and pre-commitment of a significant part of its productive capacity for a period of years. The only evidence in the record on this point is testimony presented by the appellant, on the basis of long experience in this industry, that a contract with the Port Authority would impair the prospect of timely divestiture (R. 26).

Then on February 1, 1967, the date set for divestiture, Alcoa filed its third report, which disclosed that it had no divestiture to propose and requested an extension of time until July 1, 1966 (sic) (Appendix C. *infra.*) to accomplish divestiture. The report sets forth three offers to purchase Cupples which were made in the first month of 1967, all of which were rejected by Alcoa.

By petition and memorandum dated March 31, 1967, the Department of Justice opposed any further extension of time and requested the Court to modify the final judgment (Appendix D, *infra*). The proposed modification, which would become effective in 90 days if Alcoa has not divested within that time, would provide for the establishment of a voting trust and an independent managerial board whose duty it will be to sell all the stock of Cupples within six months. If the board cannot find a purchaser it will offer the assets of Cupples at public sale to the highest bidder. For one year after the modification date Alcoa is not to

contract to supply any of Cupples' aluminum requirements, unless Cupples cannot secure favorable price and terms elsewhere. Likewise Alcoa is not to engage in the curtain wall business for a five year period.

The filing of this petition is a tacit admission that the public interest and the interest of the Appellant (and those situated like it) have not been adequately protected. The Government in its memorandum admits in effect that it was misled into believing that the award of the Port Authority contract to Alcoa-Cupples would promote timely divestiture of Cupples. (S.R. 2-3)[9]

What the Government now proposes is no panacea or even presumptively desirable. It is nothing more than a half measure, seemingly devised by counsel without any supporting material showing that economics or experienced business judgment makes the proposal one which promises effective relief. The Government's proposal is merely prospective in nature and does not attempt to deal with the difficulties which have been created, by its sufferance, and which will continue to have an abortive effect upon divestiture. A one year prohibition, for the future, of new contracts to supply aluminum to Cupples, is no cure for what has been achieved in tying Cupples to Alcoa.

Intervention by appellant will make possible full discovery, the presenting of the testimony of economists and industry witnesses, and the joinder of the

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[9] Supplemental designation of record 13 April 1967 is included as part of the record.

Port of New York Authority as a party to ensure the devising of effective relief. See 15 U.S.C. § 25.[10]

The appellant proposed this course of action in January 1967. Had intervention been granted the District Court would have had the opportunity to have full factual materials and the Port Authority before it. The "commitments" would have become a part of the record, and not as a condition for denying intervention as stated by counsel for Alcoa. They would have been weighed and evaluated, as to meaning, qualifications, scope, etc. before decision on intervention was made. Yet for reasons which the Government in effect now admits were erroneous, the Government opposed intervention. Appellant should be permitted now to intervene to disclose the inadequacy of the half measure, grounded in inconsistency, and unsupported by facts, advanced by the Government. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra.*

The Right To Intervene Under Rule 24(b) (2)

Appellant, Lupton, presented Rule 24(b)(2)[11] as an alternative ground to support intervention.

As detailed in the foregoing discussion of the application of Rule 24(a) *supra,* Lupton is a member of

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[10] Compare, *U. S.* v. *E. I. DuPont Nemours and Co.*, 177 F. Supp. 1 (D.C.N.D. Ill. 1959). In a proceeding under § 7 of the Clayton Act, the Court has authority to grant relief not only against parties found to have violated that section, but also against other parties if such relief is necessary to eliminate the effects of the acquisition offensive to the statute. Likewise, the liberality of joinder which is permitted in private antitrust actions provides an analogous consideration. *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 241 F. Supp. 259 (D.C.S.C. 1965).

[11] This rule provides that "upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim . . . and the main action have a question of law or fact in common."

the industrial class sought to be protected by the District Court's judgment and decree. As a member of this class Lupton sought standing to obtain relief from proscribed anticompetitive activities on the part of Alcoa-Cupples.

There can be little doubt that Appellant amply fulfilled the timeliness requirement of Rule 24(b). As soon as Appellant had definitive knowledge of the Cupple-Alcoa activity, it notified the Department of Justice on December 5, 1966 (R. 139), as well as the Port of New York Authority on December 7, 1966 (R. 142). When it became apparent that the Department of Justice would not disclose whether or not it was going to take corrective action, Appellant filed its motion to intervene.

An examination of the District Court's ruling from the bench and its Memorandum opinion fails to show any consideration of Lupton's motion in regard to permissive intervention. The District Court abused its discretion in not permitting the applicant to intervene, *Philadelphia Electric Co.* v. *Westinghouse Electric Corp.*, 308 F. 2d 856 (3d Cir. 1962); 4 Moore's Federal Practice (2d Ed.) ¶ 2415, when it ignored the unrefuted evidence presented in support of the motion. It is obvious from this evidence that Alcoa was operating by and through Cupples as if there were no order like the Final Judgment of 1964.

The evidence presented demonstrated that divestiture could be long delayed if not thwarted entirely if Alcoa were allowed to tie Cupples to a long-term contract, which by its very terms required Cupples or its successor to be the agent of the successful bidder Alcoa (R. 25). The question of profitability of such a contract to Cupples, as well as the details of

any assignment which Alcoa, the Justice Department and the Port Authority contemplated, were avoided by the Judge during the hearing as apparently unnecessary inquiries. (Counsel for Lupton had agreed that such matters could be disclosed to the Court and Counsel for the Department of Justice for their benefit alone for purposes of the hearing on Lupton's motion to intervene.) (R. 210-211). As the record now stands, it is crystal clear that the Appellant presented a *prima facie* case that the contemplated contract would hinder timely and effective divestiture of Cupples by Alcoa.

CONCLUSION

For all the reasons here presented the Appellant prays that the Court (1) reverse the order of the District Court denying intervention and (2) establish guidelines for the District Court's execution of its decree of divestiture, by which the impediments to divestiture will be removed and the existing and potential contractual ties between Alcoa and Cupples will be neutralized or precluded for a sufficient period of years to clear the way for effective divestiture.

Respectfully submitted,

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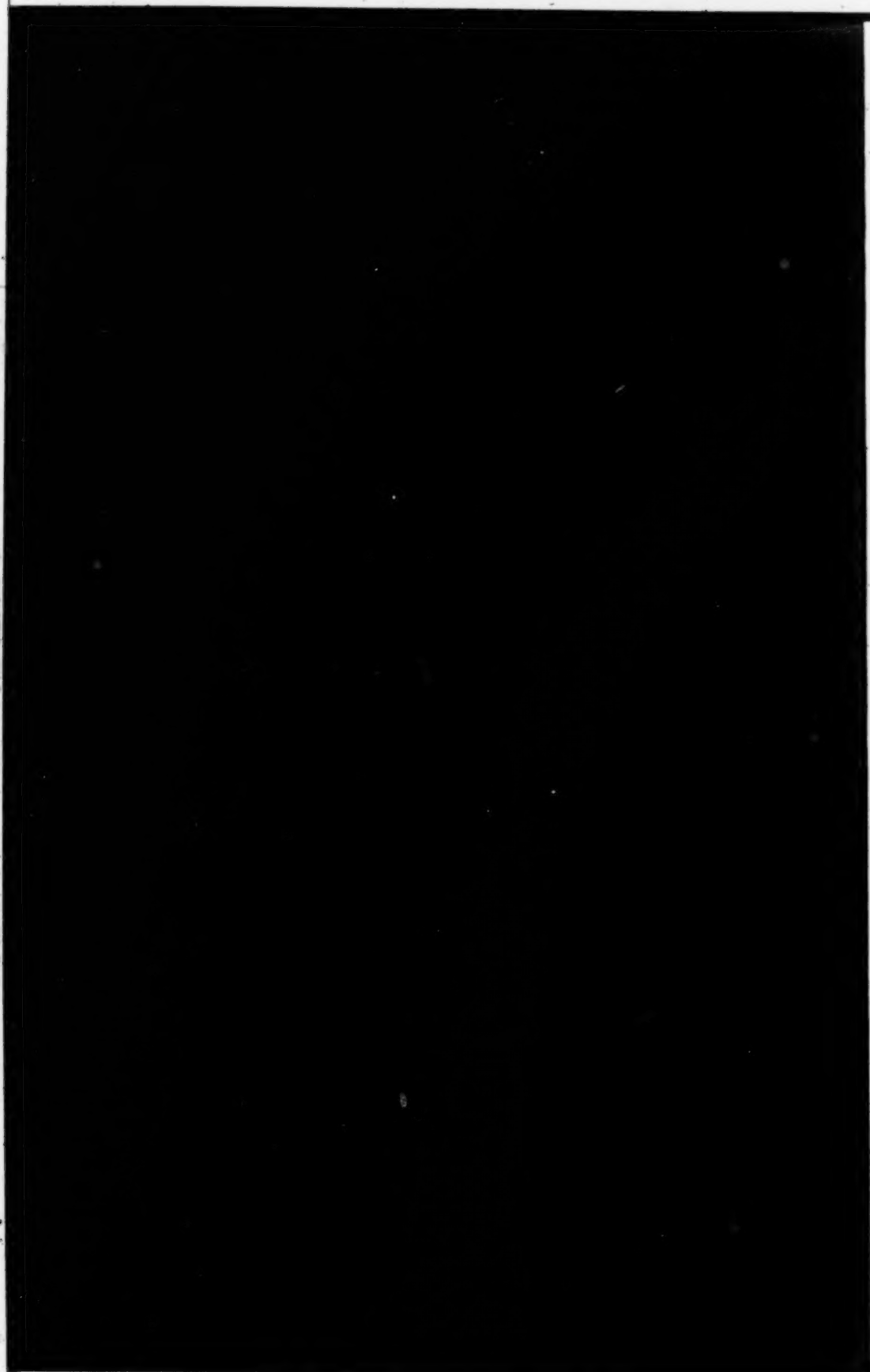

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 61 C 147 (2)

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Defendants*.

Memorandum

On January 4, 1967, Lupton Manufacturing Company filed in the above case a motion for leave to intervene as a plaintiff in this action, a motion for an order to show cause as to why defendants should not be found to have violated the final order of this Court dated December 4, 1964, and a motion for a preliminary injunction enjoining the defendants from taking any action with regard to a bid submitted to the New York Port Authority to fabricate and erect the aluminum curtain wall on the World Trade Center building in New York City.

A brief hearing was held on the morning of January 4, 1967, and the matter was continued until January 12, 1967.

In the early fall of 1963 the Port of New York Authority determined to build a World Trade Center in New York City, at a total cost of $525,000,000. This building will consist of twin 110-story towers overlooking the Hudson River. It will be the world's largest building. Cupples Products Corporation became interested in the fabrication of the curtain walls. At that time they were a wholly-owned subsidiary of Aluminum Company of America (Alcoa). The antitrust action had been brought by the government

to require Alcoa to divest itself of Cupples. Proceedings had not been concluded in the district court. A decision was filed by this Court on September 22, 1964, 233 F.Supp. 718. The final judgment was entered by the district court on December 4, 1964, requiring Alcoa to divest itself of Cupples, including after-acquired property at Corona, California, 247 F.Supp. 308. An appeal was taken to the Supreme Court. The judgment of the district court was affirmed October 11, 1965, 382 U.S. 12. Thereafter, Alcoa's proposal to divest itself of Cupples was disapproved on August 9, 1966, 257 F.Supp. 466. The date on which Alcoa has been required to submit to the Court a plan of divestiture of Cupples is February 1, 1967.

During the entire proceedings the Antitrust Division of the Justice Department has diligently protected the interest of the public in obtaining the goal set out by this Court to restore Cupples to a position as an independent entity in the aluminum fabricating business.

From the fall of 1963 until December 1966, Alcoa and Cupples have been attempting to obtain the contract for the erection of aluminum curtain walls at the World Trade Center. Their competition in this matter have been Kawneer and Lupton in conjunction with other primary aluminum producers. The bids were apparently opened in early December 1966, and it would appear that Alcoa is the low bidder. On December 5, 1966, Lupton notified the Antitrust Division of this development and requested it to intervene and ask this Court to enjoin Cupples and Alcoa from proceeding with the bid. The Antitrust Division has vigorously examined the situation from that time to the present date and has required Alcoa and Cupples to submit a great deal of information concerning the circumstances of the bidding for the purpose of determining whether or not they have violated any provisions of the final judgment of this Court. After a careful examination, of this situation, the Antitrust Division has concluded in

its opinion there has been no violation and it opposes the motion of Lupton to intervene in this proceeding.

Apparently the Port of New York Authority has required bids on this contract to be submitted by Alcoa and has consented to the assignment of the contract from Alcoa to Cupples. To complete the project, on which construction is scheduled to begin in January 1969, will take approximately two years.

Lupton has requested the Court for permission to intervene under Rule 27, F.R.C.P., and failing to intervene, Lupton suggests the Court on its own motion issue a temporary restraining order or a temporary injunction to prevent irreparable injury to themselves, to the general public, and to prevent the order of divestiture of this Court from being delayed. The Court is of the opinion that if this suggestion of Lupton's were followed and a temporary restraining order or injunction issued, it would leave the Port of New York Authority in such a condition it would have to seek elsewhere for someone to construct the curtain wall on this project. The logical place to look under these circumstances would be Lupton, and undoubtedly this is the primary reason Lupton suggests this Court take the proposed course of action.

The entire process of this trial has been long and tedious, and the ultimate goal sought to be achieved is divestiture. This Court has no intention of permitting Lupton, or any other unsuccessful bidder on a job in which Cupples is interested, to intervene in this already complicated litigation.

It stands to reason that the Port of New York Authority has no desire to let a contract which would require it to get involved in an antitrust suit not of its own making.

Cupples, like any other company that has been ordered to be sold, has had personnel problems and to deprive

it of this particular contract would further complicate its salability.

There is considerable authority to support the view that no one other than the government should be permitted in this law suit at this time, and none to support intervention. *United States* v. *Radio Corporation of America*, 186 F.Supp. 776 (E.D.Pa. 1960), appeal dismissed *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (1960); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *United States* v. *El Paso Natural Gas Co.*, 37 F.R.D. 330 (1965). Accordingly, this Court will deny the motion of Lupton to intervene and will not issue a show cause order nor a temporary injunction or take any other action which will hamper the divestiture of Cupples.

Dated this 13th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

Order

A memorandum dated this day is hereby incorporated in and made a part of this order.

IT IS ORDERED that Lupton Manufacturing Company's motions to intervene, for order to show cause, and for preliminary injunction be and the same are hereby denied. The costs of this proceeding are taxed against Lupton Manufacturing Company.

Dated this 13th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

Order Nunc Pro Tunc

The Court's memorandum of January 13, 1967, is hereby amended as follows: On page 3, at line 14, after the word "violation" is inserted the phrase "warranting an injunction".

Dated this 16th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

Order Nunc Pro Tunc

IT IS HEREBY ORDERED that on page 3, the last paragraph, line 2, of the Memorandum dated January 13, 1967, should read as follows:

"intervene under Rule 24, F.R.C.P., and failing to intervene,"

Dated this 20th day of January, 1967.

JAMES H. MEREDITH
United States District Judge

APPENDIX B

Table of Relevant Findings Made by the Court in United States v. Aluminum Company of America and Cupples Products, 233 F. Supp. 718.

A. Prior to the acquisition of Cupples, neither Alcoa nor any of its subsidiaries engaged in the fabrication of curtain wall or primary windows, but alcoa was a supplier of aluminum to Cupples and others for use in making these and other building products. *Id.* at 721.

B. That Cupples had total sales in 1961 of $19,699,027, and that of this total, $10,764,000 was in the sale of curtain wall. *Id.* at 722.

C. The determination of what materials and designs will be utilized for the construction of a building is made by the architect and the owner. Metal suppliers of non-load-bearing walls seek not only to have metal specified, but also seek to have such design specifications of that material designated as will permit their advantageous bidding once the general contract has been named. One such sub-bid may be for the non-load-bearing exterior walls . . . If the architect determines to have the curtain wall in metal, he may not only specify the type of metal, he may, in addition, specify metal made by Alcoa, Reynolds, Kaiser or others. Further, he may likewise specify a design of a particular fabricator and may specify the fabricators who are acceptable as bidders, such as Cupples . . . . *Id.* at 723.

D. The covering of a building is generally about five per cent of the total cost of the building . . . . Once the architect has settled on a design for curtain wall, if it is determined to be in metal, the competition is between the various metal suppliers and fabricators. *Id.* at 724.

E. Cupples was the largest aluminum curtain wall fabricator (1957), having 16.6% of the industry total. Plaintiff herein (formally Michael Flynn) was found to be the fourth largest fabricator with 6.9% of the industrial total. *Id.* at 726.

F. Only the large aluminum-curtain-wall fabricators have the financial resources, the engineering know-how and the experience to fabricate and erect aluminum curtain wall on large high-rise and multi-story buildings. *Id.* at 727.

Nothing would prevent Alcoa from permitting Cupples to operate on a break even basis or a loss basis for an extended period of time and at the same time make a profit on the aluminum sold by Alcoa to Cupples so that the overall operation would be at a profit.

The tendency of building owners is to require a guarantee on aluminum curtain wall for a period of five to twenty years.

Alcoa's financial reputation in relation to giving guarantees on large curtain wall jobs inures to the benefit of Cupples because a prospective purchaser of curtail wall would much rather have this guarantee than the guarantee of a smaller company. In addition, the reputation of Alcoa in solving engineering problems in aluminum makes a guarantee from Cupples more attractive than a guarantee from a company not affiliated with a primary producer.

The evidence shows that Alcoa now furnishes their engineering know-how and skill to Cupples, as well as to Cupples' competitors, and that new developments are being promoted with all fabricators on an equal basis. While this is true at the present time, there is no assurance that in the future Cupples will not be given advance information on new developments that will render other fabricators powerless to compete with Cupples. It does not seem unreasonable that Alcoa in the future would put all the aluminum curtain wall business possible into Cupples instead of the 40% which they announced as their intention when acquiring Cupples. *Id.* at 727-28.

G. In view of the avowed purpose of Alcoa to get 40% of the business of aluminum curtain wall by their acquisition of Cupples, this would mean that Cupples would have to increase their 16.6% to 40% to attain this goal. Does Alcoa have the power to increase this per cent in Cupples? This Court is of the opinion it does. If they have the power to do this, will they? This Court is of the opinion they will if Alcoa continues to own Cupples. If Cupples achieves 40% of the aluminum curtain wall business, it will then remove some of the smaller companies completely from this line of commerce and the larger ones will have a difficult time competing with the combination of Cupples and Alcoa. In reaching such a conclusion, the evidence shows that by being a subsidiary company of Alcoa, Cupples enjoys many advantages not possessed by their competitors in the field. Among those advantages is the ability to obtain unlimited funds." *Id.* at 727.

H. Alcoa sells aluminum to jobbers at a lower price than it sells to fabricators. The evidence is that Alcoa now sells to Cupples at the same price it sells to other fabricators. Nothing would prevent Alcoa in the future from selling to Cupples at jobbers prices, which would put Cupples in an even more advantageous position than other fabricators. Alcoa through the years has acquired a reputation with architects and builders as a pioneer in new developments. They spend large sums of money to advertise in trade magazines and on television, and in promoting expense-free trips to the home office by various persons in the trade, such as architects and builders, to show them new processes. Now, as a subsidiary of Alcoa, this prestige benefits Cupples,

Certain sizes, shapes and patterns for aluminum curtain wall are extruded from dies which are expensive and which are owned by Alcoa. At the present time, these dies are made available to all of Alcoa's customers, including the competitors of Cupples, provided the aluminum is purchased from Alcoa. It would be reasonable to assume this will continue as long as Cupples uses only 16% of the aluminum in curtain wall because Alcoa does not want to lose the other business. But what would Alcoa do when Cupples achieves 40% of the market? Or more than 40%? Would not Alcoa use its advantages to help Cupples and to thereby help itself? This Court is of the opinion that it would.

Duranodic finish adds a hard coat and color which makes aluminum attractive as a curtain wall material. It costs $100,000 or more to establish this process. Cupples is one of the companies licensed by Alcoa to use Duranodic. The Kalcolor licensed by Kaiser is another color process which competes with Duranodic finish. Because of its cost a small company is not able to install this process. Without color finish on aluminum, a firm cannot successfully compete in the aluminum curtain wall market. *Id.* at 728-29.

APPENDIX C

Defendants' Third Report and Petition for Extension of Time To Effectuate Divestiture

Pursuant to Paragraph 7 of the Plan of Divestiture approved by this Court on February 18, 1966, defendants Aluminum Company of America and Cupples Products Corporation (hereinafter both referred to as "Alcoa") submit this third report. In this report Alcoa sets forth the steps taken in execution of the Plan of Divestiture since November 17, 1966, the date of its last report, and describes the terms and conditions of three offers received but not accepted since that date.

Alcoa also hereby respectfully petitions the Court under Paragraph 10 of the Plan of Divestiture to extend until July 1, 1966, its time to accomplish the divestiture required by Paragraph 2 of the Plan. The grounds for this petition, as more fully described below, are (a) that despite its diligent and intensive efforts to find a purchaser, as of February 1, 1967, Alcoa had not received any acceptable offer for the business and assets of Cupples; and (b) more time is required to continue certain negotiations now in progress, and if these pending negotiations fail, to continue its efforts to find a satisfactory purchaser for Cupples.

1. In the year ending February 1, 1967, Mr. Leon E. Hickman, Executive Vice President of Alcoa, negotiated with 141 parties for the purchase of Cupples. All of these negotiations included at a minimum an expression of interest by these parties and a request for Alcoa's brochure describing Cupples. A copy of this brochure is attached to this report as Exhibit A. In several cases, negotiations were quite extended. In every case in which the recipient of a brochure expressed any further interest in the company, an opportunity was offered to inspect the Cupples' properties. Although many of the prospects accepted the offer of inspection, apparently because of the

recent bleak earnings record of Cupples most went no further.

2. Thirty-three of the 141 parties with whom some negotiations were commenced have advised Mr. Hickman explicitly that they are no longer interested in purchasing Cupples. Some 55 of the others have evinced no interest in the past several months, and Alcoa has concluded that they have dropped consideration of this acquisition. As of February 1, 1967, however, 53 inquiries were still under discussion by telephone or letter, or were made so recently that further steps or negotiations are a possibility.

3. Thirty-three brokers, investment bankers, lawyers or accountants requested a copy of the brochure describing the property for sale, apparently for the purpose of acting as intermediaries between Alcoa and others who might be interested in acquiring Cupples.

4. During January, 1967, Alcoa advertised Cupples for sale in several publications of wide distribution. These publications and the dates on which this advertisement appeared were as follows:

American Metal Market (January 4, 9 and 16, 1967)

Wall Street Journal (January 4, 6 and 16, 1967)

Corona (California) Independent (January 4, 1967)

St. Louis Post Dispatch (January 3, 1967)

South Bend Tribune (January 3, 1967)

A copy of this advertisement, which was the same in all papers, is attached as Exhibit B.

5. Since November 17, 1966, the date of Alcoa's last report to the Court, three offers to purchase Cupples have been received and rejected as unsatisfactory. The identity of the offerors, and the terms and conditions of their re-

spective offers, in the order in which they were received are set forth below.

(a) On January 6, 1967, the Fifth Avenue Coach Lines, Inc. made an offer to purchase Cupples for $1,400,000 cash (with the right in its discretion to turn back to Alcoa for collection, within 120 days after closing, $1,000,000 of the approximate $7,000,000 outstanding accounts receivable) plus a 20-year non-interest bearing note of Fifth Avenue Coach Lines in the amount of $11,900,000 (or $10,900,000 if $1,000,000 of accounts receivable are turned back to Alcoa for collection). Fifth Avenue proposed to reduce this note each year by an amount equal to 25% of the net income earned by Cupples, with the balance to be paid at the end of the 20-year period. On January 16, 1967, this offer was rejected as unacceptable.

(b) On January 11, 1967, the Universal Marion Corporation made an offer to purchase Cupples on the following terms and conditions: Universal Marion to pay $1 for the net worth of the company (shown at $1,094,257 on the September 30, 1966 balance sheet) plus 5% 25-year subordinate debentures of Universal Marion in payment of the intracompany debt of $12,217,824 due to Alcoa. Universal Marion proposed that interest on these debentures would be waived for three years, and sinking fund requirements would be waived for five years; thereafter, a sinking fund of 4% of the initial debt would mature each year. Universal Marion further proposed that Alcoa guarantee the collectability of accounts receivable approximating $7,100,000 and the usability of inventory approximating $4,600,000; that it have a six-months option to purchase the Corona plant, with the right to pay for it in Universal Marion debentures at cost or market, whichever was lower; and that the balance of any unfunded pen-

sion liability be paid by Alcoa. On January 13, 1967, this offer was rejected as unacceptable.

(c) On January 13, 1967, Alfab, Inc., a Delaware corporation chartered for the express purpose of acquiring Cupples, made an offer of $15,500,000 for all of Cupples' stock, free and clear of any liabilities. Alfab proposed to pay as follows: $500,000 at closing (to be borrowed from a bank), plus unsecured notes to be paid off at the rate of $1,000,000 per year, plus interest, with the first payment to be due five years after closing. On January 26, 1967, this offer was rejected as unacceptable.

6. Negotiations for the sale of Cupples are presently pending with the following companies:

Jacobson Investment Company, Inc.
(In behalf of Messrs. Sidney Green and Dudley Himoff)

The Seagrave Corporation

National Gypsum Co.

American Cement Company

Certain-teed Products Corp.

In addition, in the past few weeks Messrs. Charles C. Moran and Roger E. Lord, Jr. have indicated further interest in negotiating for the purchase of Cupples. On the basis of its preliminary negotiations, Alcoa is hopeful of receiving firm offers from one or more of these parties within the next 90 days, especially if the apparent easing of the tight money market continues. However, if all of these negotiations fail, Alcoa will attempt to find a buyer for Cupples from among the approximately 50 parties who appear to have some possibility of interest in the matter.

7. Except while he was engaged on an almost daily basis from December 7, 1966 through January 12, 1967, in the controversy involving the curtain wall contract for the Port of New York Authority's World Trade Center Building, Mr. Leon E. Hickman has given the matter of finding a purchaser for Cupples virtually his full time since last August, when the Court rejected Alcoa's sale to Messrs. Moran and Lord on the terms then proposed. Messrs. Moran and Lord have also given this matter top priority in their work schedule. They have spent many hours in showing the properties and have accompanied Mr. Hickman on many of his negotiating trips. Mr. Frederick J. Close, Chairman of the Board of Alcoa, and Mr. John D. Harper, President of Alcoa, likewise have participated actively in Alcoa's efforts to find a purchaser. Other officers have also been called upon by Mr. Hickman for assistance as the occasion arose, and Mr. Hickman has discussed the matter of finding a purchaser for Cupples on many occasions with each of them.

8. As shown in this and the two previous reports filed by Alcoa pursuant to Paragraph 7 of the Plan of Divestiture, in the past year Alcoa has diligently sought to find a purchaser for Cupples. The 141 parties who wrote or telephoned for information as a result of the publicity concerning the divestiture requirement, whom officers of Alcoa were able to interest by personal solicitation, or who responded to Alcoa's newspaper advertising, are believed to exhaust the field of prospective purchasers. Other than the offer of Messrs. Moran and Lord which was before the Court last August, the only firm offers resulting from these inquiries have been the three described in paragraph 5 of this Report. Each of these recent offers was not only palpably unreasonable but also subject to a great degree to the same infirmities which impelled the Court to disapprove the earlier offer of Messrs. Moran and Lord.

9. Thus, Alcoa has been unable to accomplish divestiture within the time specified in Paragraph 2 of the Plan

of Divestiture. Accordingly, to enable it to pursue its pending negotiations and to continue its efforts to obtain a purchaser whose stake in Cupples will be sufficiently great to insure the continued operation of that company in the curtain wall field, Alcoa respectfully requests the Court for an Order:

1. Extending the period in Paragraph 2 of the Plan of Divestiture from February 1, 1967 to July 1, 1967; and

2. Requiring Alcoa to continue filing the reports provided for in Paragraph 7 of the Plan of Divestiture.

Respectfully submitted,

Dated: February 1, 1967

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APPENDIX D

No. 61 C 147 (2)

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ALUMINUM COMPANY OF AMERICA and CUPPLES PRODUCTS CORPORATION, *Defendants*.

Government's Petition for Modification of Final Judgment

Pursuant to paragraph 7 of the Final Judgment entered in this cause on December 4, 1964, the United States of America petitions the Court for the following modification of that Judgment to become effective within ninety (90) days if Alcoa has not theretofore carried out the divestiture ordered by the Judgment and the Plan of Divestiture approved by the Court on February 18, 1966:

Strike paragraph 3 and substitute therefor:

3. (a) Within thirty (30) days after the effective date of this modification, Alcoa shall create a voting trust and transfer to it all shares of stock of Cupples.

(b) The trustees, who will be appointed by the Court at a compensation to be fixed by the Court and paid by Alcoa, shall elect a board of directors of Cupples, the majority of which shall be persons who hold no shares of stock of Alcoa.

(c) No person shall be eligible to serve as a trustee or member of the board of directors of Cupples who is an officer, director, or employee of a primary aluminum producer, or who controls, directly or indirectly, one-twentieth of one per cent or more of the stock of a primary aluminum producer or an affiliate or subsidiary thereof.

(d) Within six months fram the date of their appointment, the trustees shall sell all the stock of Cup-

ples held in trust by them or all of Cupples' assets to a purchaser who will undertake in good faith to continue the operation of Cupples as a going business and who is not objected to by plaintiff.

(e) As soon as the terms of sale have been agreed upon and at least thirty days before consummating the proposed sale, the trustees shall so advise the Court, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the price, terms, and conditions of the proposed sale. At any time prior to consummation of the proposed sale, plaintiff may file with the Court and serve upon the trustees a statement of its objections to the proposed sale, and in such event the proposed sale shall not be consummated unless approved by the Court.

(f) In the event that sale of Cupples has not been accomplished in accordance with the provisions of paragraph (d) of this Order, within thirty days thereafter the trustees shall offer the assets of Cupples at a public sale to the purchaser who will undertake in good faith to continue the operation of Cupples as a going business, who is the highest bidder submitting a sealed bid, and who is not objected to by plaintiff. All bids shall be received and opened twenty (20) days after the offering. Ten (10) days after the opening the trustees shall advise the Court of the proposed sale, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the price, terms, and conditions of the proposed sale. Thirty (30) days thereafter sale to such purchaser shall be consummated unless prior thereto plaintiff has filed with the Court and served upon the trustees a statement of its objections to the proposed sale, in which event the sale shall not be consummated unless approved by the Court.

(g) From the effective date of this modification until one year after the sale of Cupples has been approved by the Court, Alcoa shall not contract to supply any of

Cupples' aluminum requirements, unless no other supplier of aluminum is able or willing to supply those requirements at a price and upon terms and conditions as favorable as those which Alcoa offers, in which event Alcoa shall contract to supply such requirements of aluminum as Cupples may request, at such prices, terms, and conditions as are equally available to Cupples' competitors.

(h) If the purchaser of Cupples elects not to purchase the Corona assets referred to in paragraph 2(1) of the Final Judgment, or Cupples' assets at Dowagiac, Michigan, Alcoa shall sell those assets within niety (90) days after the sale of Cupples has been approved by the Court. As soon as the terms of sale have been agreed upon and at least thirty days before consummating the proposed sale, Alcoa shall so advise the Court, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the price, terms, and conditions of the proposed sale. At any time prior to consummation of the proposed sale, plaintiff may file with the Court and serve upon Alcoa a statement of its objections to the proposed sale, and in such event the proposed sale shall not be consummated unless approved by the Court.

(i) All expenses incident to the accomplishment of the divestiture ordered herein shall be paid by Alcoa.

(j) Until five years after the agreement of sale of Cupples has been approved by the Court, Alcoa shall not engage, directly or indirectly, in the metal curtain wall business.

Respectfully submitted,

EDNA LINGREEN
Edna Lingreen
Attorney, Department of Justice

March 31, 1967

Memorandum in Support of Government's Petition for Modification of Final Judgment and in Opposition to Defendants' Request for Extension of Time.

Final Judgment entered in this cause on December 4, 1964 requires the Aluminum Company of America to divest itself of all of the stock and assets of Cupples Products Corporation, as well as of the assets located at Corona, California, which were operated by Cupples. Defendants' appeal to the Supreme Court with respect to divestiture of the Corona assets resulted in a stay of the Judgment. After the Supreme Court affirmed, a Plan of Divestiture was approved by this Court on February 18, 1966. Under that Plan Alcoa was required to accomplish divestiture in accordance with the Judgment by February 1, 1967. On May 23, 1966 Alcoa advised the Court that it had agreed to sell the Cupples assets to Charles C. Moran and Roger E. Lord, Jr., but that sale was disapproved on August 9, 1966. On February 1 defendants filed their third report, required under the Plan of Divestiture, and also petitioned for an extension of time until July 1, 1967 [1] within which to accomplish divestiture.

The Government is opposed to this request. While we acquiesced, in general, in the plan for divestiture which Alcoa submitted to the Court more than a year ago, events have demonstrated that that plan was inadequate to achieve divestiture. Accordingly, the Government now proposes modifications of the Judgment which it believes are appropriate to speed the accomplishment of effective divestiture.

The Government's Proposed Modifications

The Government proposes that, if Alcoa has not carried out the divestiture ordered by the Judgment and the Plan

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[1] Although defendants' request is for extension "until July 1, 1966," we assume this is a typographical error, in view of the fact that the request was made on February 1, 1967.

of Divestiture within an additional 90 days, the stock of Cupples shall be transferred to trustees independent of Alcoa. Under the Government's proposal, the trustees will elect a board of directors to operate Cupples pending divestiture and will be required to sell Cupples within six months of their appointment. Failing such sale, the proposed modification provides for public sale to the highest bidder submitting a sealed bid. Whether sale is accomplished by negotiation or by sealed bid, the Government would have the right to object to the sale, which would not be consummated unless approved by the Court.

The proposed modification of the Judgment also provides that Alcoa shall not contract to supply aluminum to Cupples unless Cupples cannot secure as favorable price and terms elsewhere. It enjoins Alcoa from engaging in the metal curtain wall business for a period of five years after the sale of Cupples. And if the purchaser of Cupples elects not to purchase the Corona and/or Dowagiac assets, those assets are required to be sold separately.

Need for Modification

Alcoa has represented that award of the contract to furnish the curtain wall for the World Trade Center will substantially enhance Cupples' saleability. Alcoa, however, has not yet complied with the divestiture which has been ordered. Should it fail to do so within the near future, we believe the case is made for a change in procedure in order to secure compliance with the Judgment and "restore Cupples to a position as an independent entity in the aluminum fabricating business."[2]

Such efforts as Alcoa has made in regard to divestiture may be summarized as follows: Until after the Supreme Court had affirmed the Final Judgment in this cause and the Plan of Divestiture had been approved by this Court,

[2] *United States* v. *Aluminum Company of America*, — F.Supp. — (E.D. Mo., January 13, 1967).

Alcoa declined to negotiate with interested persons for the stated reason that it was awaiting establishment of the "ground rules." Negotiations had begun meanwhile, however, with Messrs. Moran and Lord. From February 18, 1966, when the Plan of Divestiture was approved, until disapproval of the proposed sale on August 9, 1966, Alcoa turned away inquiries from others on the ground that it was negotiating with Moran and Lord.[3] Even after the disapproval, Alcoa moved at a leisurely pace. The brochure required by the Plan of Divestiture of February 18, 1966 was not made available until sometime in the fall. The notebooks of correspondence which Mr. Hickman has had with the 141 parties with whom Alcoa reports he negotiated[4] disclose that approximately half of these so-called negotiations were not initiated until January 1967, after Alcoa advertised Cupples for sale.

We have not seen documentation of all of the negotiations but some of what we have seen demonstrates that reluctant sellers find it difficult to make a sale. For example, in the document attached hereto as Appendix A, Mr. Hickman noted that a prospect was no longer interested in purchasing Cupples after talking with Messrs. Moran and Lord, who were reported to have been "entirely too pessimistic about the prospects of the company to justify further consideration." Such pessimism is hardly consistent with the recurring interest of Morgan and Lord to buy Cupples themselves,[5] but may have succeeded in discouraging others. Obviously anyone considering the purchase of Cupples would want to consult with Moran and Lord, the two individuals most thoroughly knowledgeable with respect to

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[3] Testimony of Leon Hickman, July 21, 1966, p. 77.

[4] Defendants' Third Report, February 1, 1967, p. 2.

[5] Defendants' Third Report, dated February 1, 1967, states, on p. 5, that "in the past few weeks Messrs. Charles C. Moran and Roger E. Lord, Jr. have indicated further interest in negotiating for the purchase of Cupples."

Cupples' business and prospects. In view of their admitted interest in acquiring Cupples themselves, they have a stake in discouraging others. Mr. Hickman recognized this when he added to his request to Mr. Moran that the Cupples property be shown in the best possible light the comment, "I realize that you face a conflict of interest in doing so . . . ."[6]

Alcoa has taken the position that the price at which Cupples will be sold is not negotiable. For example, on October 28, 1966, Mr. Hickman wrote to a potential purchaser, "I will not be in a position to lower our asking price . . . ."[7] Evidently Alcoa has decided on the price which it considers it should receive and refuses to lower it. As the letter notes, Alcoa is willing to negotiate on how much of Cupples' assets it will sell if a potential purchaser finds the price too high, but it will not negotiate the price.

There is nothing in the Final Judgment or the Plan of Divestiture approved by the Court, however, which can be interpreted as giving Alcoa the right to insist upon its asking price. In fact, the absence of such language evidences the Court's intention not to let any question concerning the reasonableness of the price stand in the way of divestiture. Alcoa submitted a proposed final judgment to the Court in October 1964 which contained a provision for divestiture "at a fair and reasonable price," but the Final Judgment does not include such language. Again, on December 28, 1965, when Alcoa submitted a plan of divestiture for the Court's approval, it proposed in paragraph 5 that divestiture be "at a reasonable price and upon reasonable terms," with "due regard" to such factors as the original price paid, expansion and improvements, Cupples' indebtedness to Alcoa, the current asset value, etc. On both occasions the Government opposed inclusion of the criterion of reason-

[6] Appendix B.

[7] Appendix C.

ableness of price. It urged that, inasmuch as Alcoa is under Court order to divest, it is entitled only to the best price it can get under all the circumstances and should not have the option to refuse an offer because it considers it too low. The Court struck Alcoa's proposed language. Paragraph 5 of the Plan of Divestiture which the Court approved reads in its entirety as follows:

> The divestiture required by this Plan shall be at a price and upon terms to be approved by the Court.

Despite this language and the circumstances of its adoption by the Court, Alcoa has taken the position with potential purchasers that it can set the price. Quite apart from the fact that Alcoa does not have the right to decide at what price it will sell, it may be that its price is too high. Mr. Hickman has called Cupples a "conundrum" and emphasized its poor earnings record. He has also noted that the industry has become highly concentrated, with two or three companies doing most of the business.[8] While he may consider this concentration desirable and points to Cupples as "the leader of its industry," it may be that a potential purchaser would have such reservations concerning Cupples' ability to continue in a leadership position in a concentrated industry without Alcoa as its parent as to make him reluctant to pay the price demanded by Alcoa.

To an inquiry from a person interested in acquiring the Corona property, Mr. Hickman responded on January 11, 1967 that Corona would not be available individually until sale of the other Cupples property had been approved by the Court. Then he added:

> Furthermore we have closed the Corona plant for lack of business and Cupples has moved the plant equipment back to St. Louis. Consequently Corona, if sold separately, will be disposed of as a piece of

[8] Appendix D.

industrial real estate. The anodizing facility is not there.[9]

This language appears to be inconsistent with the requirement of the Order entered by this Court on April 16, 1965 that the Corona plant be "maintained in good condition, capable of being reactivated promptly," and suggests either that defendants have acted in disregard of that Order or that Mr. Hickman has been highly inaccurate in negotiating with potential purchasers of Cupples.

The Government believes that the circumstances warrant such modification of the Judgment as will increase the incentive to comply with the Judgment promptly. For that reason the Government proposes that Alcoa be allowed a maximum of an additional 90 days to comply with the Plan of Divestiture. If it fails in that, control of Cupples should be taken from it and placed in trustees, who would have six months to sell the company by negotiation, after which it would be sold on sealed bid. Such provisions as these should serve as a spur to divestiture and therefore are appropriate in the circumstances.

The provision limiting Alcoa's right to contract to supply Cupples is also aimed at encouraging prompt divestiture, since this limitation would make retention of Cupples less profitable to Alcoa. Although Cupples apparently has not had a good earnings record during its ownership by Alcoa, there is no reason to believe that Alcoa has not found the relationship profitable, both in its aluminum sales to Cupples and in other ways. At the time of the acquisition Cupples had an earned surplus of $1.7 million (GX 5). Since then, even though Cupples was operating unprofitably, Cupples' directors continued to declare dividends, payable to Alcoa, until the surplus was exhausted. And, as is disclosed by Appendix F, Cupples' losses have meant tax savings for Alcoa. The unprofitability of Cupples,

[9] Appendix E.

therefore, can by no means be assumed to have been unfortunate for the parent. In fact, to the extent that the poor earnings record makes Cupples a less attractive purchase than a profitable company would be, Alcoa may, under an unmodified decree, consider its chances of ultimate retention of Cupples to be enhanced.

An injunction against Alcoa's competing with Cupples for a period of years would make Cupples a more attractive purchase than it would be if the purchaser were faced with the threat of Alcoa's competition. As is noted in Appendix G, when Messrs. Moran and Lord were negotiating for the purchase of Cupples they sought a commitment from Alcoa not to compete. But the agreement of sale which was submitted to the Court on May 23, 1966 contained no such provision. The Final Judgment which the Court entered on December 4, 1964, provided for divestiture within one year. It was therefore anticipated that the close association between Alcoa and Cupples which is inherent in common ownership would be severed promptly. It will, however, have continued for another two and a half years. Some reputation and knowledge in the curtain wall industry inevitably has accrued to Alcoa during the interval, enhancing the threat of its engaging in that business itself. If it did so it would be in competition with its severed subsidiary while trading on the reputation achieved by the combined operation during the years of existence of the illegal merger.

It would not be appropriate to leave the matter of Alcoa's possible competition to negotiation between Alcoa and the potential purchaser, lest Alcoa consider a commitment not to compete an asset for which it would expect to be paid. Rather it is the Government's view that a company making an illegal acquisition is entitled to no benefits or rewards from that acquisition. Alcoa is not entitled to profit from its acquisition of Cupples by going into the curtain wall business and therefore is not entitled to compensation for foregoing the right to engage in that business.

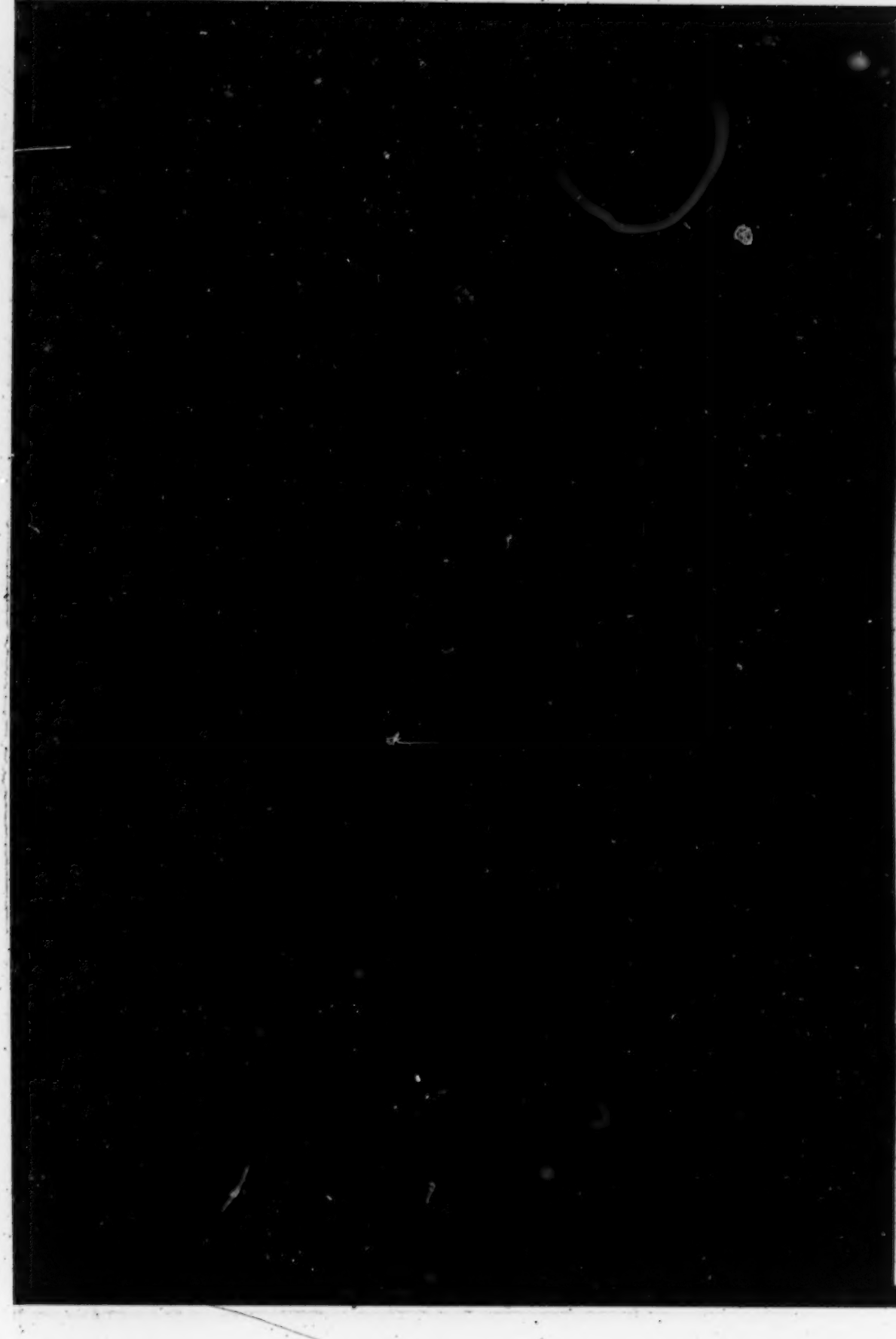
Conclusion

For the foregoing reasons, it is respectfully urged that the Judgment entered on December 4, 1964, be modified in accordance with the Government's proposals, and that defendants' petition for modification be denied.

Respectfully submitted,

Edna Lingreen
Attorney, Department of Justice

Dated: March 31, 1967



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Cases:

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263-633—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1296

LUPTON MANUFACTURING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, AND CUPPLES PRODUCTS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO DISMISS

Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States moves that the appeal be dismissed.

STATEMENT

This is a direct appeal from an order of the district court (J.S. App. 1a–4a) denying the application of appellant, the Lupton Manufacturing Company ("Lupton"), to intervene in divestiture proceedings being conducted pursuant to the final judgment in *United States of America* v. *Aluminum Company of America and Cupples Products Corporation*, 253 F. Supp. 718, 247 F. Supp. 308, affirmed *per curiam*, 382 U.S. 12.

1. In this action, brought on April 27, 1961, the United States charged that the acquisition by Aluminum Company of America ("Alcoa") of all of the outstanding stock of Cupples Products Corporation ("Cupples") violated Section 7 of the Clayton Act, 15 U.S.C. 18. At the time, Alcoa was the leading producer of primary aluminum and Cupples the leading fabricator of aluminum curtain wall. The complaint alleged, *inter alia*, that the acquisition would cause a substantial lessening of competition, and tend to create a monopoly, in the fabrication and sale of metal and aluminum curtain wall, by eliminating potential competition between Alcoa and Cupples and by giving Cupples competitive advantages over fabricators not integrated with primary aluminum producers. The government asked for divestiture by Alcoa of Cupples' stock.

In May 1962, after Alcoa had begun the construction of a new curtain wall facility at Corona, California, the government moved for a preliminary injunction to restrain further construction of the Corona plant on that ground that Alcoa intended to retain that plant for its own operation even if it was ordered after trial to divest Cupples, that it was using Cupples' know-how in the planning and construction of the plant, that it planned to transfer Cupples' personnel to Corona, that there would be further commingling of assets and that Cupples' goodwill would be diluted. Although the court did not enjoin construction of the Corona plant, it did issue a preliminary injunction on July 30, 1962, enjoining defendants from any

[1] The order of the district court on the government's motion for a preliminary injunction is reported, together with the final

further commingling of business assets; requiring Cupples to continue exercising independent judgment and activity in its operations, to publicize the Cupples name distinctly and to maintain separate pension plans and separate sales organizations; barring the transfer of Cupples employees to Alcoa and the sale by Alcoa of Cupples stock; and requiring that the Corona plant be operated as a part of Cupples and that the products manufactured there be advertised and sold as Cupples products.

On September 22, 1964, the district court found that Alcoa's acquisition of Cupples violated Section 7 (233 F. Supp. 718). After a further proceeding to formulate appropriate relief, the court on December 4, 1964, entered a final judgment requiring Alcoa to divest itself of all interest in Cupples and in the Corona plant (247 F. Supp. 308), at the same time continuing in effect the preliminary injunction of July 30, 1962.

Alcoa appealed the final judgment directly to this Court, but challenged only the requirement that it divest the Corona plant. This Court affirmed summarily, *Aluminum Company of America* v. *United States*, 382 U.S. 12. On February 18, 1966, the district court approved a plan which required Alcoa to accomplish divestiture by finding a purchaser for Cupples.[2] (App. B, *infra*, pp. 20–23.)

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judgment in the action and an order modifying the order of July 30, 1962, to permit the closing of the Corona plant in *United States* v. *Aluminum Company of America*, 247 F. Supp. 308, 316–317, reprinted in App. A, *infra*, pp. 15–19.

[2] The plan requires an Alcoa representative to approach firms or individuals with a possible interest in acquiring Cupples and

2. In the fall of 1963, the Port of New York Authority decided to build a World Trade Center building in New York City, consisting of twin 110-story towers overlooking the Hudson River, which would require a large amount of aluminum curtain wall. Alcoa and Cupples attempted to obtain the contract in competition with appellant, a producer of curtain wall, and other companies. Alcoa's bid stated that if Alcoa was awarded the contract Cupples would perform the work. The Port Authority required that the bid be submitted by Alcoa, but consented to assignment of the contract to Cupples (J.S. App. A, p. 3a). Formal bids were submitted to the Authority on or before December 2, 1966, and on December 5, 1966, Alcoa was notified that it was the low bidder (R. 218, Tr. 20).

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provide them with relevant financial and factual information. If no serious leads are developed within 90 days, several business brokers with national connections are to be retained, on a nonexclusive basis, to aid in finding a purchaser. If, after an additional 90 days, the combined efforts of Alcoa and the brokers have not developed serious leads, Alcoa must take appropriate further steps to find a purchaser. Under this provision Alcoa has advertised Cupples for sale in several publications, including the *American Metal Market* and the *Wall Street Journal*. Alcoa is also required to file reports with the district court at 90-day intervals setting forth the steps taken in execution of the plan. In August 1966, Alcoa's plan to sell Cupples to two of its principal officers was disapproved by the district court after the United States objected that the terms of the proposed sale would not ensure Cupples' independence. 257 F. Supp. 466. After Alcoa reported in February 1967 that no purchaser had been found and requested an extension to accomplish divestiture, the United States moved the court to speed the accomplishment of divestiture by transferring Cupples' stock to independent trustees under instructions that they are to sell the firm within six months of their appointment (J.S. App. D). This motion is pending.

On December 5, 1966, appellant for the first time complained to the Antitrust Division of the Department of Justice that the Alcoa-Cupples bid violated the injunction and final judgment in this case. The Department conducted an investigation, required Alcoa to furnish it detailed information, and carefully reviewed the entire transaction. It obtained assurances from Alcoa that the contract would be assigned to Cupples, that Cupples, not Alcoa, would be credited with the goodwill arising from award of the contract, and that any purchaser of Cupples could seek reformation of any unfulfilled Alcoa-Cupples contract on the ground it had been entered into improvidently. The government was also assured by Cupples' president that he considered the contract to be profitable for Cupples. In the light of this data, the Department concluded that the transaction did not violate the court's orders, injure Cupples or imperil divestiture (see, further, *infra*, pp. 9–10).

On January 4, 1967, appellant moved for leave to intervene as a plaintiff in this action both as of right under F.R. Civ. P. 24(a) and by permission of the court under F.R. Civ. P. 24(b), and requested an injunction restraining Alcoa and Cupples "from taking any action with regard to a bid submitted to the New York Port Authority to fabricate and erect the aluminum curtain wall on the World Trade Center building * * *" (J.S. App. 1a). Appellant asserted that Alcoa's action in submitting the bid and its assistance to Cupples in preparing the bid violated both the preliminary injunction and final judgment. Alcoa and the United States opposed the motion to

intervene, but the government did not object to the court's hearing Lupton as *amicus curiae*.

The district court conducted a hearing in which appellant was permitted to present evidence in support of its motion, including the testimony of Cupples' president and three Cupples employees, whom it had subpoenaed, and of appellant's president. The court, after hearing appellant's evidence, denied intervention. It noted that issuance of the injunction would benefit appellant but be a great detriment to Cupples. It further ruled "that the Antitrust Division has adequately protected the interest of the public in this proceeding from the beginning and at the present time. The Court's primary purpose at this point is to sell Cupples to some purchaser as a strong independent company. And the Court is of the opinion that the obtaining of this particular job, the World Trade Center, will be of benefit to Cupples in that regard" (Tr. 65). The court subsequently entered a formal opinion (J.S. App. A; 41 F.R.D. 342). On January 24, 1967, the Port Authority announced that Alcoa had won the contract and that Alcoa would assign it to Cupples.

ARGUMENT

Appellant, a manufacturer of aluminum curtain wall, applied to the district court below to intervene in the remedial phase of the Alcoa-Cupples merger case in order to block Alcoa-Cupples' successful bid for the contract to supply the aluminum curtain wall for the World Trade Center in New York. After an evidentiary hearing, the court denied intervention,

finding that the retention of the contract by Cupples would help, not harm, the prospects for prompt and effective divestiture of Cupples by Alcoa and was not barred by the preliminary injunction earlier entered by the court. This ruling is correct, and further review is unwarranted. We discuss first the contention that appellant was entitled to intervene as of right.

1. Intervention as of right in the federal district courts is governed by Rule 24(a) of the Federal Rules of Civil Procedure. As recently amended,[3] the rule precludes such intervention whenever the applicant's interest is adequately represented by existing parties. What constitutes adequate representation in a government antitrust suit was before the Court this Term in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129. In that case, the Court held that where the government accepts a remedial decree that falls short of complete divestiture as directed by the mandate of this Court in the case, the government's representation of the interest of customers of the acquired firm in the proceeding is inadequate and they may intervene as of right. This ruling cannot assist appellant here. There is no mandate of this Court directing divesture.[4] The only mandate is the district court's and that court had a broad discretion in interpreting its own decrees. Moreover,

[3] The amended rule is applicable here since the relevant district court proceedings postdated July 1, 1966, the effective date of the amendment.

[4] The Court did summarily affirm the district court's final decree, 382 U.S. 12, but the only issue raised in this Court on that appeal related to the Corona plant and was unrelated to the World Trade Center contract.

263-628—67——2

here it is the applicant for intervention, not the government, that would deny the acquired firm a valuable asset which should be divested along with its other properties so as to enhance the likelihood that the remedy of divestiture will be practicable: the World Trade Center contract obtained by Cupples after the acquisition. In short, as explained more fully below, the government's representation of the interest asserted by appellant was adequate under the standards of the *Cascade* decision.

We do not understand appellant to base its claim of intervention upon a theory that it has a right to bid for the World Trade Center contract free from the competition of Cupples. Obviously, the antitrust laws confer no such right. Rather, appellant asserts an interest, identical to the government's, in free and unrestricted competition among aluminum curtain wall manufacturers. Its contention is that retention of the contract by Cupples after Cupples is divested by Alcoa will frustrate the objective of the antitrust suit, and of the district court's preliminary injunction and final decree of divestiture, to restore Cupples as an independent and effective competitor; and that the government's acquiescence in this course demonstrates the inadequacy of its representation of the competitive interest that appellant asserts. We believe the contention is without merit.

The purpose of the preliminary injunction was to preserve the possibility of divestiture pending the entry of a final decree. To this end, Alcoa was enjoined from appropriating Cupples' goodwill and know-how, commingling Cupples' assets with its own, or otherwise acting to weaken Cupples. Obtaining the

valuable World Trade Center contract promoted rather than impaired the objectives of this decree, since it strengthened Cupples.

Because Cupples is subject to an order of divestiture, it operates in a shadow of uncertainty over its future which weakens its current competitive position. It has had personnel problems (J.S. App. A, p. 3a) and customers seeking to place large orders, like the Port Authority, cannot be sure that the current management will control the company when the orders must be filled. That Alcoa assisted Cupples to obtain a valuable contract in this difficult period facilitated eventual divestiture, and hence is entirely consistent with the district court's final decree. The contract makes Cupples an immeasurably more valuable bundle of assets to any prospective purchaser. Just as in *Cascade, supra,* this Court insisted that the acquired firm be given in divestiture any valuable properties acquired after the unlawful merger, so here the district court and the government quite properly took the position that the World Trade Center contract should go to the purchaser of Cupples along with its other properties.

We stress that before approving the contract the government made extensive inquiry to assure that Cupples would not be harmed, or divestiture delayed. Thus, it required Alcoa and Cupples to submit detailed information concerning the circumstances of the bidding and provide adequate assurances that Alcoa was not appropriating goodwill or know-how belonging to Cupples for the purpose of enhancing Alcoa's position should it enter the curtain wall business on its own. In exploring the effect upon divestiture, the government examined the proposed terms of

arrangements between Alcoa and Cupples and determined that they were not disadvantageous to Cupples. The president of Cupples submitted a detailed written statement indicating that the proposed contract would be very profitable for Cupples, which has been operating at only 85 percent of its capacity[5] since it would take up an additional 12 percent of its idle capacity without interfering with its other operations. The Department also received commitments from Alcoa designed to prevent the contract from standing in the way of divestiture of Cupples. In addition, Alcoa agreed that the purchaser of Cupples would have the right to ask the court for reformation of any contracts between Alcoa and Cupples if the purchaser found that they had been entered into improvidently.

As a result of its investigation and these assurances, the Antitrust Division was satisfied that the proposed contract would not hinder divestiture. With respect to the possible unlawful appropriation of Cupples' goodwill by reason of Alcoa's participation in the transaction, the Department secured commitments[6] from

[5] Cupples lost $1,397,000 in 1964 and $2,687,000 in 1965 (attachment to Defendant's Second Report Pursuant to Plan of Divestiture filed in the District Court, November 17, 1966).

[6] Appellant complains that it "had no opportunity to examine" the series of commitments which the government received from Alcoa to prevent Alcoa from acquiring, by reason of the World Trade Center contract, any goodwill belonging to Cupples (J.S. 10). A general description of these commitments was provided in the government's brief in opposition to intervention in the district court (R. 177-190). And defendants offered to disclose the specific terms of these commitments to the court provided they were received under seal; they only objected to placing these commitments in the public record where they might become known to potential purchasers of Cupples and thereby perhaps depress the purchase price (R. 211; Tr. 18).

Alcoa that it would assign the contract to Cupples if it won the award; that Alcoa would not advertise or represent that it secured the contract on the basis of its own expertise in the curtain wall field, or that it was the fabricator of the curtain wall for this project; and that after award of the contract Alcoa would inform the Port Authority and the architects, contractors and engineers with whom it had dealt that the know-how, technology, engineering and other expertise in the curtain wall field embodied in its proposal were furnished by Cupples. In addition, the Port Authority advised the Department that it would permit the assignment of the contract to Cupples.

We further emphasize that the district court did not routinely or uncritically accept the results of the government's inquiry. It conducted an evidentiary hearing at which appellant was permitted to offer evidence challenging Cupples' retention of the World Trade Center contract. Thus, appellant was accorded the substantial rights of an intervenor. Yet, it failed wholly to substantiate its charges; it cannot complain, therefore, because it was denied formal intervention. At the hearing it urged that "the low bid submitted by Alcoa has not been shown by the government or Alcoa to be profitable for Cupples rather than for Alcoa in supplying the necessary primary aluminum" (J.S. 9) and that the contract will require a "pre-commitment of a significant part of [Cupples'] pro-

ductive capacity for a period of years" (J.S. 16). Yet, it never questioned Cupples' president concerning the profitability of the contract, although it was aware of counsel's representation that it would benefit Cupples (Tr. 23, 24); it did not develop any testimony indicating that Cupples' productive capacity would be tied up disadvantageously; it presented no economic evidence showing that the contract might substantially lessen competition; and it did not demonstrate any conceivable basis upon which the district court could have concluded that the government was guilty of a default in acquiescing in the contract.[1]

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[1] Appellant purports to find in the government's application for modification of the final judgment, filed on March 31, 1967 (see Statement, *supra* fn. 2, p. 4; J.S. App. A), evidence that the government now admits it has inadequately represented the public interest. We believe that a fair reading of this memorandum plainly refutes this contention. Contrary to appellant's argument, when the government approved Alcoa-Cupples' bid for the Port Authority contract it did not represent to the district court that the contract alone would guarantee divestiture by February 1, 1967, the deadline in the decree. It stated only that the contract might enhance Cupples' saleability, thus serving the ultimate purpose of the decree. We still believe this. But since Alcoa has not yet succeeded in disposing of the company, the government believes that the district court should itself take steps to accomplish the divestiture through trustees directed to sell either to a private purchaser or at public sale to the highest bidder. So we have urged in the application for modification. This is a problem entirely separate from the Port Authority contract. The award of the Port Authority contract to Alcoa-Cupples is not in any way inconsistent with the trustee proposal, since it assures buyers that Cupples will be transferred with a very valuable order on its books. If anything the government's trustee motion demonstrates its diligence and concern for accomplishing prompt divestiture.

2. The district court did not abuse its discretion in denying permissive intervention. Rule 24(b) provides that "in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." And the delay of the divestiture proceedings in this case while appellant seeks to set aside the award of the Port Authority contract would harm the ultimate objective of this suit—divestiture of Cupples from Alcoa.

CONCLUSION

The district court correctly denied intervention. The appeal should therefore be dismissed.[8]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
ROBERT K. JOHNSON,
Attorneys.

MAY 1967.

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[8] See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137.

APPENDIX A

United States District Court, Eastern District of Missouri, Eastern Division

No. 61C147(2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND CUPPLES PRODUCTS CORPORATION, DEFENDANTS

ORDER

The Court, having examined the complaint filed on April 27, 1961, having heard and considered oral arguments on plaintiff's Motion for Preliminary Injunction filed May 22, 1962, and having considered affidavits and exhibits in support of and in opposition to the Motion,

Orders that, pending final disposition of this action, the defendants, Aluminum Company of America and Cupples Products Corporation, are hereby enjoined as follows:

1. From any further consolidating or commingling of any business assets, financial, good will, personnel or otherwise;

2. Defendant Cupples shall continue to exercise independent judgment and activity in its operations;

3. Defendants Alcoa and Cupples shall continue to publicize distinctly the name of Cupples in connection with products Cupples manufactures and to make no more pronounced indication of Cupples affiliation

with defendant Alcoa than exists in the exhibits before this Court;

4. Defendants Cupples and Alcoa shall maintain separate pension plans;

5. Defendants Cupples and Alcoa shall maintain separate sales organizations;

6. Defendants Cupples and Alcoa are restrained from transferring any Cupples employees to Alcoa, and Alcoa is restrained from employing any of Cupples employees;

7. Defendant Alcoa is enjoined from selling or conveying any Cupples stock acquired by Alcoa;

8. Defendant Alcoa shall continue to hold the title to the real estate and equipment of the recently built plant at Corona, California, in its subsidiary Gateway Properties, Inc. This plant shall be operated by Cupples and the products made therein shall be Cupples products and shall be sold and advertised as Cupples products.

The Memorandum containing findings of fact and conclusions of law is adopted and by reference made a part of this Order.

FINAL JUDGMENT

This Court having conducted a trial as to plaintiff's complaint and having rendered its findings of fact and conclusions of law thereon, dated September 22, 1964, and having had a further hearing on November 24, 1964, relating to the entry of a final judgment,

[7] It is hereby ordered, adjudged and decreed as follows:

1. The acquisition of the stock of defendant Cupples Products Corporation (Cupples) by defendant Aluminum Company of America (Alcoa) is in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

2. Within one year from the date of the entry of this final judgment defendant Alcoa shall:

(1) divest itself of all right, title and interest in the assets (including all the real estate) which are located at Corona, California, and which have been operated by defendant Cupples; and

(2) divest itself of all ownership of the stock, share capital, assets, tangible and intangible, and other interest it may have in defendant Cupples;

3. Within sixty (60) days from the date of entry of this final judgment, defendant Alcoa shall submit to this Court for approval and to the plaintiff a detailed plan setting forth the manner by which defendant Alcoa proposes to accomplish the divestiture ordered in paragraph 2 hereof and a report stating the efforts made by defendant Alcoa to accomplish said divestiture. Within thirty (30) days after this submission, plaintiff shall notify the defendants of its objections, if any, to this plan. In the event that there are any such objections, the parties shall confer and, if they cannot thereby resolve their differences, a hearing will be held and the differences resolved by this Court. Divestitures shall then be accomplished by defendants in accordance with the plan approved by the Court.

4. The divestiture ordered in paragraph 2 hereof shall be made in good faith as a going business, shall be absolute, unqualified, and unconditional and to a person or corporation in which defendant Alcoa does not own stock or financial interest;

5. The Order entered by this Court on July 30, 1962, shall remain in effect, subject to further order of this Court, *Provided, however*, that nothing contained therein shall prohibit defendant Alcoa from

selling or conveying any of Cupples' stock, share capital or assets under the plan of divestiture approved by this Court pursuant to paragraph 3 of this final judgment.

6. Defendant Alcoa shall pay all taxable costs;

7. Jurisdiction is retained to enable any of the parties to petition for such further and different relief as may be necessary or appropriate to accomplish the terms of this final judgment or as may be necessary or appropriate for the construction or carrying out of this final judgment, for the enforcement of compliance therewith, and punishment of violations thereof.

ORDER MODIFYING ORDER OF JULY 30, 1962, TO PERMIT CLOSING OF CORONA PLANT

Having heard argument on defendants' motion to modify the order entered in this action on July 30, 1962, so as to permit defendants to close the plant at Corona, California, and having fully considered the arguments presented by plaintiff and defendants with respect to said motion, the Court is of the opinion that defendants are entitled to the modification which they seek because:

1. The Corona plant has been sustaining substantial and continuing losses and there are no reasonable grounds for believing that this condition will improve.

2. The substantial losses sustained as a result of the operation of the Corona plant are adversely affecting the strength and viability of Cupples, and will continue to do so unless the Corona plant is shut down.

Therefore, it is hereby

Ordered that notwithstanding paragraph 8 of the order entered in this action on July 30, 1962, defendants may close the plant located at Corona, California, which is presently being operated by de-

fendant Cupples Products Corporation under a lease from Delcalo; Inc., a wholly owned subsidiary of defendant Aluminum Company of America, *provided, however,* that defendant Aluminum Company of America shall see to it that said plant is maintained in good condition, capable of being reactivated promptly.

APPENDIX B

United States District Court, Eastern District of Missouri, Eastern Division

No. 61C147(2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALUMINUM COMPANY OF AMERICA AND CUPPLES PRODUCTS CORPORATION, DEFENDANTS

PLAN OF DIVESTITURE

1. The purpose of this Plan is to provide for the divestiture of Cupples Products Corporation (Cupples) as a going business capable of engaging in the manufacture, distribution, and sale of fabricated aluminum products, such as curtain wall, windows, extrusions, suspended ceiling systems, doors, door frames, store fronts and entrances.

2. Within one year from February 1, 1966, Alcoa shall divest itself of all ownership of the business and assets of Cupples, including: (a) all Cupples trademarks, trade names, good will and other intangible assets; (b) all tangible assets of Cupples, including the plants operated by Cupples before the acquisition at St. Louis, Missouri, and Dowagiac, Michigan, and the warehouse operated by Cupples before the acquisition at Dallas, Texas, including all additions and improvements made to the said plants and warehouse since the acquisition; and (c) at the option of the purchaser, the assets (including all the real estate) which

are located at Corona, California, and which have been operated by Cupples under lease from Delcalo, Inc. Pending divestiture, and unless otherwise ordered by the Court, the St. Louis and Dowagiac plants and the Dallas warehouse shall be maintained in good order as operating units; the Corona plant shall be maintained in good condition capable of being reactivated promptly.

3. The divestiture required by this Plan shall be accomplished either by sale of Cupples' stock or, at the option of the purchaser, by sale of all Cupples' assets, tangible and intangible, and assumption by the purchaser of Cupples' liabilities. If the purchaser elects to take the assets at Corona, California, referred to in Paragraph 2(c), such assets shall be conveyed by Alcoa.

4. The divestiture required by this Plan shall be absolute, unqualified, and unconditional and to a person or corporation not disapproved by the Court; *provided, however,* that nothing herein shall prohibit Alcoa from retaining such reasonable security or other interest as the Court may approve.

5. The divestiture required by this Plan shall be at a price and upon terms to be approved by the Court.

6. Mr. Leon E. Hickman, an Executive Vice-President of Alcoa, or such other person as Alcoa shall suggest and the Court shall approve, will be responsible for implementing this Plan of Divestiture. Under his direction and control, a systematic effort will be made to locate a purchaser. As a first step, a list of prospective purchasers will be compiled consisting of firms or individuals (a) which have previously expressed an interest in acquiring Cupples, or (b) which Alcoa or Cupples, based on its knowledge of the aluminum fabricating, curtain wall, and related industries, believes may be possible purchasers. Each of

the listed prospects will then be approached, beginning with the most promising, in order to determine whether it is interested in considering the acquisition of Cupples. For this purpose, an appropriate brochure will be prepared setting forth relevant financial and factual information as to Cupples' assets, earnings, product line, and the like. If a prospect indicates a *bona fide* interest in acquiring Cupples, further and more detailed information will be provided. If the direct approach outlined above has not developed any serious leads in ninety (90) days, several (approximately 2 to 4) business brokers with national connections would be retained to aid in finding a purchaser. Since such brokers would be engaged on a non-exclusive basis, Alcoa would be free to continue with its direct efforts to effect a sale. If, after an additional ninety (90) days, the combined efforts of Alcoa and the brokers have not developed serious leads, Alcoa would take such other and further steps as shall be appropriate to find a purchaser.

7. Ninety (90) days after February 1, 1966, and at ninety (90) day intervals thereafter, Alcoa will file with the Court and serve upon the plaintiff a Report setting forth the steps taken in execution of this Plan. If any offer has been received but not accepted during the period covered by the Report, the Report shall identify the offeror and describe the terms and conditions of such offer. Upon petition of the plaintiff, the Court may be asked to determine whether any such offer must be accepted by Alcoa under the provisions of the Final Judgment and this Plan of Divestiture.

8. As soon as Alcoa and a prospective purchaser have agreed upon the terms for a sale of Cupples, Alcoa shall so advise the Court, with notice to plaintiff, identifying the purchaser and setting forth in appropriate detail the terms and conditions of the proposed

sale. If within thirty (30) days after receiving such notice, the plaintiff does not object to the proposed sale, and the Court does not disapprove *sua sponte*, Alcoa shall proceed forthwith to effectuate the sale. If within the said thirty (30) day period the plaintiff objects, the parties shall confer, and if they cannot thereby resolve their differences, a hearing will be held and the differences resolved by the Court. If plaintiff's objections are overruled, Alcoa shall go forward with the sale; if plaintiff's objections are sustained and the Court disapproves the proposed sale, Alcoa shall continue its effort to effect a sale in accordance with this Plan.

9. If the purchaser of Cupples in a sale effected pursuant to this Plan elects not to take the Corona assets referred to in Paragraph 2(c), Alcoa will dispose of the said Corona assets separately.

10. In the event no acceptable offer is received within twelve (12) months after February 1, 1966, either party, upon notice to the other, may petition the Court for such modification of the Final Judgment and this Plan as may be appropriate in the circumstances.

JAMES H. MEREDITH,
United States District Judge.

DATED: FEBRUARY 18, 1966, ST. LOUIS, MISSOURI.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

No. 1296

MAY 19 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

LUPTON MANUFACTURING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, and CUPPLES PRODUCTS CORPORATION, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Missouri

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MOTION OF ALUMINUM COMPANY OF AMERICA AND CUPPLES PRODUCTS CORPORATION TO DISMISS

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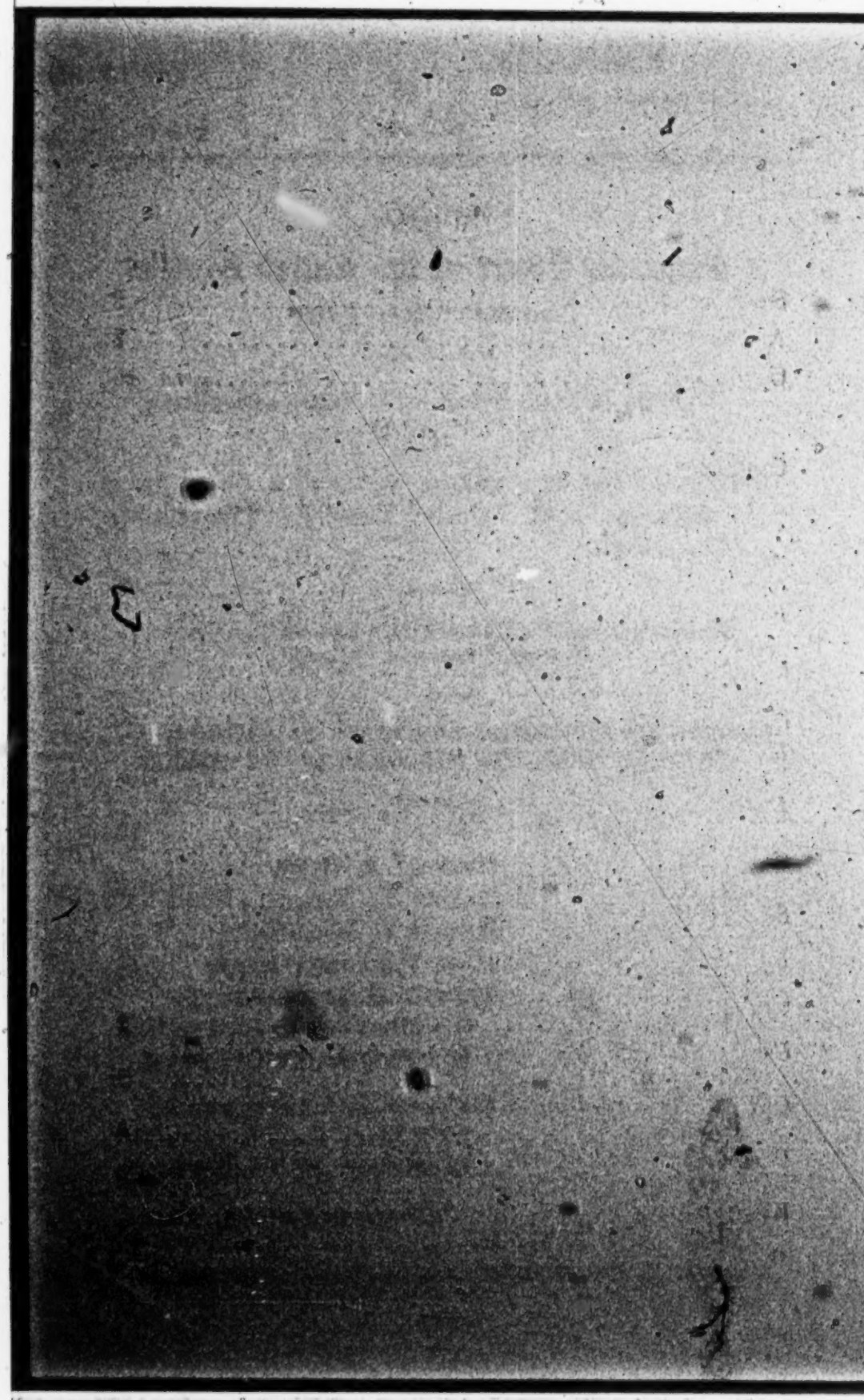

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---

MOTION OF ALUMINUM COMPANY OF AMERICA AND CUPPLES PRODUCTS CORPORATION TO DISMISS

Pursuant to Rule 16 of the Rules of this Court, Aluminum Company of America and Cupples Products Corporation move that the appeal in this case be dismissed.

STATEMENT

This is a direct appeal from an order of the district court (J.A. 4a) denying intervention in the antitrust divestiture proceedings being conducted pursuant to the decision in *United States* v. *Aluminum Company of America*, 233 F. Supp. 718. The district court ruled in that case that the acquisition by the Aluminum Company of America (Alcoa) of the Cupples Products Corporation (Cupples) violated Section 7 of the Clayton Act (15 U.S.C. 18) since it can reasonably be expected substantially to lessen competition in the fabrication and sale of metal curtain wall and aluminum curtain wall (233 F. Supp. at 729-30).

Following hearings to determine the proper method and the scope of the divestiture ordered by the district court, a final judgment was entered on December 4, 1964 requiring Alcoa to divest all of its ownership interest in Cupples and also to divest its interest in an aluminum curtain wall fabricating plant located at Corona, California, which had been built by Alcoa more than two years after its acquisition of Cupples (*United States* v. *Aluminum Company of America*, 247 F. Supp. 308). The judgment provided that divestiture "shall be made in good faith as a going business, shall be absolute, unqualified, and unconditional and to a person or corporation in which defendant Alcoa does not own stock or financial interest" (247 F. Supp. at 317). The final judgment also incorporated the provisions of a preliminary injunction entered on July 30, 1962, designed to prevent Alcoa and Cupples from consolidating or commingling their business assets or good will (247 F. Supp. at 315; R. 184-86, 188). These injunctive provisions were not intended to prevent Alcoa from assisting Cupples in

the ordinary course of business pending divestiture (R. 184-86, 188, 210).

Alcoa appealed to this Court only from that portion of the final judgment which required it to divest the after-acquired Corona plant. On November 5, 1965, this Court granted the Government's motion to affirm (*Aluminum Company of America* v. *United States*, 382 U.S. 12).

On February 18, 1966, pursuant to the Final Judgment, a Plan of Divestiture was fashioned and approved by the district court requiring the divestiture of Cupples "as a going business capable of engaging in the manufacture, distribution and sale of fabricated aluminum products . . . either by sale of Cupples' stock or, at the option of the purchaser, by sale of all Cupples' assets . . . to a person or corporation not disapproved by the Court . . . [and] at a price and upon terms to be approved by the Court" (R. 307).[1] Additionally, detailed steps were specified for obtaining a purchaser and Alcoa was required at 90-day intervals to file with the court and serve upon the Government a report "setting forth the steps taken in execution of this Plan" (R. 307). The Plan provided that in the event no acceptable offer had been received by February 1, 1967, either party could petition for modification of the judgment or of the Plan of Divestiture (R. 307).

Soon after adoption of the Plan of Divestiture, Alcoa concluded negotiations with the principal officers of

[1] Appellant mistakenly identifies this Plan as "Alcoa's plan of divestiture" (J.S. 7). Alcoa's plan, however, was objected to by the Government, whereupon Alcoa filed a revised plan. Following a hearing, the court entered its own modified version of the revised plan.

Cupples (who had also been the principal officers of that company prior to its sale to Alcoa), which resulted in the execution on May 20, 1966 of an agreement to sell Cupples to a new company to be formed by those officers (*United States* v. *Aluminum Company of America*, 257 F. Supp. 466, at 467). Submitted to the district court on May 23, 1966, the proposed sale was finally rejected on August 9, 1966 primarily on the grounds that the prospective purchasers were putting in too little of their own capital; that since Alcoa was being required to finance virtually the whole purchase price and also to provide substantial working capital, the purchasers would lack the independent status required by the Plan of Divestiture; and further, that Alcoa had not sufficiently explored the possibility of finding other purchasers "who have sufficient capital to operate Cupples without relying completely on Alcoa for financing and who will be able, should adverse business circumstances arise, to weather any economic storms . . ." (257 F. Supp. at 468).[2]

Thereafter, as required by the Plan of Divestiture, Alcoa filed reports with the court detailing its diligent and extensive efforts to find a purchaser. Subsequent to the filing of the notice of appeal in this case, Alcoa reported to the district court on February 1, 1967 that it had been unable to locate a purchaser willing to buy the company on terms which the court would approve, and requested an extension of time to July 1, 1967 within which to continue present negotiations and other efforts to secure a purchaser willing and able to con-

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[2] The Plan of Divestiture provides "that nothing herein shall prohibit Alcoa from retaining such reasonable security or other interest [in the divested company] as the court may approve" (R. 307).

tinue the operations of Cupples in the aluminum curtain wall industry (J.S. 13a, 14a). As noted in its report of February 1, 1967, the continuing bleak earnings record of Cupples over the past several years was making the task of finding an acceptable purchaser extremely difficult (J.S. 9a). Most of the potential prospects uncovered by Alcoa had expressed no interest in acquiring the company after seeing Cupples' earnings record (R. 303-04).

The present controversy stems from an announcement by the Port of New York Authority in 1963—before the trial in this case began—of plans to construct a so-called World Trade Center in New York City, to be housed in twin towers which will constitute the tallest buildings in the world. In the fall of 1963 Cupples became interested in fabricating and erecting the curtain wall for this project (J.S. 1a) and by early 1964 was already developing preliminary designs and procedures (R. 215).

In the summer of 1964 before the decision in this case, so-called budget bids for the project were invited from prospective contractors including Alcoa (R. 23). Final bids were submitted on December 2, 1966 (R. 28). Alcoa submitted a bid specifically representing that Cupples would be the fabricator of the curtain wall (R. 24). On December 5, 1966, the Port Authority announced that Alcoa would be awarded the contract. On this date, Lupton made its first complaint to the Department of Justice concerning the World Trade Center contract (R. 139).

The Government immediately made inquiries to the Port Authority and the latter stated that it would not negotiate further with Alcoa pending the outcome of the Government's investigation (R. 219). Upon in-

vestigation the Government learned that Alcoa and Cupples believed that this contract would be valuable business for Cupples and would significantly improve its recent poor earnings record, thereby enhancing prospects for divestiture (R. 183, 187).

Nothing in the Final Judgment or the Plan of Divestiture prohibited Alcoa from aiding Cupples in obtaining business pending divestiture; to the contrary, Alcoa is required to dispose of Cupples "as a going business." However, since Alcoa and Cupples had been enjoined from consolidating their business assets and good will, the Government in the course of its investigation sought and obtained from Alcoa, formally and in writing, several specific assurances. Thus, at the Government's insistence, Alcoa agreed to seek to have the contract awarded directly to Cupples, or failing that, to assign the contract outright to Cupples, if the Port Authority would not agree to either of these courses, to sub-contract the job to Cupples. Alcoa also specifically agreed that it would in no event allow any obligation or commitment undertaken by Cupples relating to the performance of this curtain wall contract to stand in the way of divestiture of Cupples (R. 187, 209).

After thorough investigation, the Government concluded that award of the contract to Cupples was fully consistent with the order of the court looking to timely and effective divestiture (R. 187, 189, 209).

On January 4, 1967, appellant filed motions for leave to intervene (R. 6), for an order to show cause as to why Alcoa should not be found in violation of the final judgment of December 4, 1964 (R. 9), and for a preliminary injunction enjoining execution of the Port

Authority contract (R. 7, 8). The motions were briefly heard on January 4, 1967, following which the court set the matter down for a formal hearing to be held on January 12, 1967, and specifically granted appellant the right at that time to present any testimony or other evidence it might choose relating to its various motions (R. 168). Although appellant was not a party, it was permitted to subpoena witnesses for the hearing, including officers and employees of Cupples, who were examined without restriction. All of the documentary evidence proffered by appellant was received.

Denying appellant's various motions, the district court stated that the Government "has vigorously examined the situation" (J.S. 2a) and that no violation of the final judgment of the court had been revealed. Emphasizing its view that assignment of the contract to Cupples would enhance divestiture, the court held (J.S. 3a-4a):

> The entire process of this trial has been long and tedious, and the ultimate goal sought to be achieved is divestiture. This Court has no intention of permitting Lupton, or any other unsuccessful bidder on a job in which Cupples is interested, to intervene in this already complicated litigation.
>
> * * *
>
> Cupples, like any other company that has been ordered to be sold, has had personnel problems and to deprive it of this particular contract would further complicate its saleability.

ARGUMENT

Appellant relies on *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 87 S. Ct. 932, the first decision of this Court in more than 25 years allowing intervention in a Government antitrust suit.

Contrary to appellant's intimations, however, neither *El Paso* nor the recent amendment to Rule 24(a) of the Federal Rules of Civil Procedure has eliminated the requirement that a would-be intervenor in such a case demonstrate a particularized interest in the subject matter of the suit which coincides with the interest of the general public and which is not being adequately protected by the Government.

While screened by allegations that it is concerned lest divestiture in this case be ineffective and untimely, it is clear that appellant's only interest is in blocking the award to Cupples of the World Trade Center curtain wall contract, in which event Lupton, an unsuccessful bidder for that contract, would attempt to procure the work for itself. This "interest" in depriving Cupples of a valuable asset is exactly the converse of the interest of the intervenors in *El Paso,* who were seeking the allocation of additional assets to the New Company, and provides no basis for intervention under Rule 24(a).

1. In *El Paso,* following this Court's remand to the district court with directions to order divestiture without delay, the Department of Justice and El Paso stipulated to a divestiture decree in "settlement of the litigation" (87 S. Ct. at 937). The decree bypassed "the prospect of an outright purchase of the assets of the new company or its stock by outside interests" (*id.,* at 940) and provided, among other things, for the formation of a New Company to which certain of the assets acquired by El Paso from Pacific Northwest would be transferred. The State of California, Southern California Edison Company, and Cascade sought to intervene, claiming that the provisions of the proposed divestiture decree were in conflict with the man-

date of this Court that the competitive situation in the natural gas industry in California be restored and that Pacific Northwest or its successor company be reconstituted as a viable competitor.

On appeal from an order denying intervention, this Court concluded that the interest of the State of California and Southern California Edison was sufficient to sustain their right to intervene under former Rule 24(a)(3), since "protection of California interests in a competitive system was at the heart of our mandate directing divestiture" (87 S. Ct. at 937).[3] Cascade, a natural gas distributor in Oregon and Washington whose sole supplier would be the New Company, had no interest in the California market. However, Cascade complained that the stipulated divestiture decree permitted a grossly unfair division of gas reserves between El Paso and the New Company and would also permit El Paso to impose onerous price and other conditions on the New Company, thereby seriously impairing its ability as a supplier to Cascade in the future. This

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[3] There is no such mandate in the present case. Alcoa did not appeal from the judgment of the district court ordering general divestiture, but sought review only of that portion of the divestiture decree which required it to dispose of the plant at Corona, California, constructed by it after the acquisition. This Court affirmed *per curiam*. Thus, there is no need for review in the present case at the instance of the putative intervenor "to see that [the Court's] mandate is carried out" (87 S. Ct. at 937). Compare *Continental Insurance Co.* v. *United States*, 259 U.S. 156, at 166 ("We delegated to the district court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree, in any proper way, is brought to our attention, to see that it follows our opinion") with *First Security National Bank & Trust Co.* v. *United States*, 382 U.S. 34.

Court held that new Rule 24(a)(2) was broad enough to include these interests of Cascade, since, in any event, "the entire merits of the case must be reopened to give California and Southern California Edison an opportunity to be heard as of right as intervenors . . ." (*ibid.*).

The interest of the appellant in the present case is precisely the opposite of the interest of Cascade in *El Paso*. Cascade, and indeed the other intervenors in that case, were customers or potential customers of the company to be divested. In seeking to assure the allocation of adequate assets to the New Company and to prevent the imposition upon it of unfair contracts, the ultimate interest of Cascade in the relief to be ordered by the district court was in assuring the establishment of a strong divested company capable of effective and viable future performance. In seeking intervention for the sole purpose of depriving Cupples of a valuable asset, it is clear that appellant in the present case has no interest in seeing this competitor launched on an economically viable and competitive basis.

Thus, unlike the situation in *El Paso*, appellant's private interest in this case is in the establishment of a weak Cupples. Since this interest is not coincidental with the interest of the public in the divestment of a strong, competitive Cupples, no right of intervention is recognized by *El Paso*, or any other case. Indeed, in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, relied upon in *El Paso*, this Court anticipated applications of would-be intervenors with interests adverse to those of the general public and distinguished such an interest from the one before it as follows (312 U.S. at 508):

> Nor can the enforcement of this [interest of the intervenor] be deemed remotely in conflict with other public duties of the Attorney General, nor to bring in digressive issues, nor to impeach the existing decree. It is a vindication of the decree.

2. Even assuming that appellant has any genuine interest in this case other than the divestment of a weak Cupples and the securing of a large contract for itself, it is clear that award of the World Trade Center contract to Cupples would enhance rather than impede effective divestiture. Because of the poor earnings record of the company during the past several years, Alcoa has been unable to find a purchaser for Cupples which the district court would approve. The World Trade Center contract is expected to improve the earnings of the company significantly, and thus make Cupples more attractive to prospective purchasers.

Appellant relies on the opinion of its president expressed at the hearing on intervention that award of the contract to Cupples would have an adverse effect upon the prospects of divestiture (R. 59-60). This conclusion was based on a belief that prospective purchasers of Cupples would be made uncertain and doubtful as to the actual value of this curtain wall contract, and thereby discouraged from purchasing the company, because of Alcoa's agreement with the Government that certain contracts between Alcoa and Cupples were subject to reformation. The short answer is that appellant's president overlooked the fact that the World Trade Center contract was not one of the contracts subject to this reformation agreement (R. 220).

In any event, the self-serving statement of appellant's president, based on a misconception of the facts,

is completely refuted by the obvious benefits to Cupples of this contract. These benefits include the prestige and profitability[4] of a contract to fabricate and erect the curtain walls of the world's highest structures. Similarly, the contract would assure use of a portion of Cupples' unemployed capacity[5] and its provisions for prefabrication at the plant site rather that at the job and for payment upon inspection rather than at the time of delivery would allow flexible, slack-time production (R. 222). As the district court correctly concluded (J.S. 3a-4a): "Cupples, like any other company that has been ordered to be sold, has had personnel problems and to deprive it of this particular contract would further complicate its saleability."

Nor is there merit in the argument that assignment of the contract would result in a continuation of unlawful ties between Alcoa and Cupples. It is anticipated that the contract will be performed within two years after construction of the World Trade Center begins in 1969. But any relationship between Alcoa and Cupples during the period of construction would

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[4] Appellant suggests an impropriety on the part of Alcoa and Cupples in decreasing the initial Alcoa bid on this contract (J.S. 8). In point of fact, however, this downward modification not only was very "minor" (R. 251) and did not influence the award, but Lupton itself lowered its bid at the invitation of the Port Authority after being informed that all bidders had been given this opportunity and that all had revised their quotations downward (R. 24).

[5] Cupples has operated for a substantial period of time at less then 85% of capacity (R. 222). Fulfillment of the World Trade Center contract would require commitment of approximately 12% of Cupples' total capacity for a period of not more than 4 years from the present date (*ibid.*). Contrary to appellant's contention (J.S. 16), this commitment would not unduly interfere with the ability of Cupples to undertake other curtain wall projects.

be a normal commercial relationship arising out of the ordinary course of business. Similarly, any guarantee which Alcoa may give of Cupples' performance would run to the New York Port Authority and could not result in any unlawful relationship between Alcoa and Cupples in the post-divestiture period.

The implication of appellant's contention is that Cupples should be deprived of any and all business obtained during the period between entry of the divestiture decree and actual sale upon the complaint of competitors who are interested in that business. Clearly such an "interest" does not qualify as a ground for intervention under Rule 24(a) and appellant's argument must be rejected.

3. Appellant was also properly denied leave to intervene in this litigation for the reason that it completely failed to demonstrate that any recognizable interest it may claim to have was not being adequately protected by the Department of Justice.

While not accorded the formal status of a party, appellant was nevertheless, over the objections of Alcoa but with the consent of the Government, permitted to call witnesses, to file briefs, and to argue its motion at length. After hearing appellant's witnesses and argument and receiving its documentary evidence, the court concluded that a case for intervention had not been made out, noting, *inter alia* (J.S. 2a):

> During the entire proceedings the Antitrust Division of the Justice Department has diligently protected the interest of the public in obtaining the goal set out by this Court to restore Cupples to a position as an independent entity in the aluminum fabricating business.

With respect to the World Trade Center contract in particular, the Department of Justice sought and obtained explicit assurances from Alcoa, which were repeated to the court, that the contract would not be permitted to interfere in any way with the divestiture of Cupples and that Alcoa would not represent that it had secured the contract on the basis of its own expertise in the fabrication and erection of curtain wall. In addition, it was at the insistence of the Government that Alcoa undertook to obtain permission from the New York Port Authority to the award of the contract to Cupples.

On March 31, 1967 the Government filed a petition seeking modification of the final judgment to become effective within 90 days if divestiture has not been accomplished by that time. In addition to a number of provisions allegedly designed to speed divestiture, the proposed modification would prevent Alcoa from engaging in the metal curtain wall business, directly or indirectly, for a period of five years from the date of approval of any sale of Cupples.[6]

Thus, unlike the situation in *El Paso,* the Government in the present case has vigorously and diligently sought to deprive Alcoa of any and all benefits it may allegedly have obtained in the curtain wall industry by virtue of the acquisition. Appellant offers no evidence to demonstrate inadequate representation in this respect. Its claim of inadequate protection relates only to the asserted failure of the Government to seek

[6] Alcoa is vigorously opposing the proposed modifications, which it believes are improper and unnecessary. Nevertheless, the Government's petition underscores the fact that it has at all times been alert in guarding what it considers to be the public interest in speedy and effective divestiture.

to deprive Cupples of the World Trade Center contract. As shown above, however, appellant's "interest" in weakening Cupples prior to divestiture cannot sustain intervention as of right under Rule 24(a).

4. It is equally clear that the district court did not abuse its discretion in failing to allow permissive intervention under Rule 24(b). See *Brotherhood of R.R. Trainmen* v. *Baltimore and Ohio R. Co.*, 331 U.S. 519. No statute confers a conditional right to intervene. Since appellant's "claim" involves a purely private desire to wrest the World Trade Center contract from Cupples, no common question of law or fact between that claim and the main action is discernible.[7] And, unlike Cascade in *El Paso* (see Brief of Appellant, No. 4, Oct. Term, 1966, at p. 38), appellant here does not claim that its "interest" can only be protected if it is permitted to intervene in this litigation. See *Sam Fox Publishing Co.* v. *United States* 366 U.S. 683, at 690; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, at 23.

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[7] The private and ancillary nature of appellant's "interest" in this case raises serious doubt that this Court has jurisdiction under Section 2 of the Expediting Act (15 U.S.C. 29) to review the order of the district court denying appellant's motions. Unlike *El Paso*, appellant here did not attempt to intervene for the purpose of assisting in the formulation of the divestiture decree, and, indeed, appellant has no quarrel with that decree. Intervention was sought solely for the purpose of enjoining an ordinary commercial transaction, a matter of interest only to the private parties involved. As this Court has recognized, "[t]he purpose of the [Expediting] Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party" and is not applicable to a controversy "entirely between private parties . . ." (*Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39, at 40). See also *United States* v. *ASCAP*, 341 F. 2d 1003 (2d Cir. 1954), cert. denied, 382 U.S. 877.

Finally, it should be noted that Rule 24(b) directs the trial court in exercising its discretion to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In the circumstances of this case, there was a proper exercise of discretion by the district court in refusing to permit "Lupton, or any other unsuccessful bidder on a job in which Cupples is interested, to intervene in this already complicated litigation" (J.S. 3a).

CONCLUSION

Appellant was not entitled to intervene as of right in this Government antitrust suit and the district court did not abuse its discretion in failing to allow permissive intervention. The order denying intervention, therefore, is not appealable and the appeal should be dismissed. See *Westinghouse Broadcasting Co.* v. *United States,* 364 U.S. 518; *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683; *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137.

Respectfully submitted,

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May 19, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1296

LUPTON MANUFACTURING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, and CUPPLES PRODUCTS COMPANY, *Appellees*

On Appeal from the United States District Court for the Eastern District of Missouri

OPPOSITION OF LUPTON MANUFACTURING COMPANY TO MOTIONS TO DISMISS

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OPPOSITION OF LUPTON MANUFACTURING COMPANY TO MOTIONS TO DISMISS

The separate motions to dismiss filed by the United States and Alcoa-Cupples fail adequately to deal with the significance of the change in Rule 24(a)(2) of the Federal Rules of Civil Procedure.

The motions do not dispel but rather by admissions to be noted herein, confirm the substantial and unique nature of the questions presented by this appeal.

I.

Adequacy of Representation by the Government

In its Jurisdictional Statement Lupton referred to the requirements of the Port Authority that the successful bidder guarantee the work for a period of twenty-five years, and that any subcontractor was made the express agent of the successful bidder who was to be responsible for the successful completion of the project. (Jurisdictional Statement p. 8). The practical significance and the importance of this is underlined by a remarkable assertion:

> . . . customers seeking to place large orders, like the Port Authority, cannot be sure that the current management [of Cupples] will control the company when the orders must be filled. (Page 9, Government's Motion).

Thus there is an admission, in all but direct terms, that as a *sine qua non* for obtaining the Port Authority contract Alcoa and Cupples should be tied together to give assurance to the prospective customer of something comparable to the present control by Alcoa of Cupples. Thus, the Government has condoned, renewed and extended the adverse effect of the joinder of Cupples and Alcoa, which has been adjudged to have prospective anticompetitive effects.

The failure of the Department of Justice to seek to block the unification of Alcoa and Cupples in a long term, multi-million dollar contract and its opposition to Lupton's intervention is especially significant in light of the District Court's previous finding that Alcoa could run Cupples at a loss or break even point and still make a profit on the metal supplied to Cupples.

It would be strained to view as mere chance the fact that neither the Government nor Alcoa-Cupples has

directly met the issue presented by the District Court's order which directed Cupples to exercise independent business judgment in the conduct of its business affairs pending divestiture. (See page 5 of the Jurisdictional Statement). Alcoa simply decided that the contract would be assigned to Cupples when Lupton sought to attack it as a threat to divestiture.[1]

Apparently the movants are unanimous in their views that as long as the contract is determined by them to be "profitable" for Cupples, and that they say so to the District Court, without any supporting verification, the inquiry is at an end. Although Lupton's evidence was that the contract would not promote divestiture, the Court below was not provided with any evidence that the Port Authority Contract would be profitable to Cupples or that tying Cupples to Alcoa would make Cupples more attractive rather than less attractive.

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[1] Roger Lord, Executive Vice President of Cupples admitted at the hearing on January 12, 1967, that the question of whether Cupples would be assigned any contract awarded to Alcoa had not been submitted to him for his agreement or disagreement, and he also stated he knew nothing of any consideration to be paid by Cupples for such assignment. So far as he knew such matters had not been put to the Board of Directors of Cupples. (R. 245-247). See also testimony of Davis, Chief Engineer of Cupples, who had no knowledge of any bid change (R. 242). See also, Appendix A of the opposition, letter from Hickman, an Executive Vice President of Alcoa, to Certain-teed Products, February 6, 1967; "I am sure you know that Alcoa was awarded the curtain wall contract on the World Trade Center and that the contract will be assigned to Cupples. The Department of Justice questioned our right to proceed in this manner but ultimately acquiesced." (Appendix A, page 12). *Cf.* page 5 of Alcoa-Cupples Motion which attempts to gloss over the fact that the Government instituted suit approximately two years before the World Trade Center was even announced.

On page 5 of the Government's Motion it is stated:

> The Department conducted an investigation, required Alcoa to furnish it detailed information, and carefully reviewed the entire transaction. It obtained assurances from Alcoa that the contract would be assigned to Cupples, that Cupples, not Alcoa, would be credited with the goodwill arising from the contract, and that any purchaser of Cupples could seek reformation of any unfilled Alcoa-Cupples contract on the ground that it had been entered into improvidently. The government was also assured by Cupples' president that he considered the contract to be profitable for Cupples. In light of this data, the Department concluded that the transaction did not violate the court's orders, injure Cupples or imperil divestiture. . . . (See also pages 9-10 of Government's Motion).[2]

All that is specified is a set of representations of Alcoa and Cupples, not part of the record. Thus, it is clear from the Government's own description that its action was based only on representations made by Alcoa and Cupples. Nothing like an independent investigation is described so far as this issue is concerned.[3] Accept-

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[2] Regarding this action Alcoa-Cupples states "[t]he Government immediately made inquiries to the Port Authority and the latter stated that it would not negotiate further with Alcoa pending the outcome of the Government's investigation (R. 219). Upon investigation the Government learned that Alcoa and Cupples believed this contract would be valuable business for Cupples and would significantly improve its poor earnings record, thereby enhancing prospects for divestiture (R. 183, 187)." (Alcoa-Cupples' Motion pp. 5-6).

[3] See the "MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTIONS OF LUPTON MANUFACTURING COMPANY" filed in the Court below wherein the Court is advised "[i]n particular, the Government has examined the proposed terms of arrangements between Alcoa and Cupples to determine that they are not on their face at least disadvantageous to Cupples." (R. 186-187).

ance of these assurances amounted to resting action on mere conclusions without independant verification that they made business or economic sense and would result in a situation which would promote competitive conditions and not act as an impediment to divestiture.

This Court is informed that "[t]he president of Cupples submitted a detailed written statement indicating that the proposed contract would be very profitable for Cupples . . . ." It is difficult to understand why the Government has never disclosed this statement before. Of course, it is not precisely clear when this statement was submitted. However, at the hearing on January 12, 1967, the president of Cupples admitted that there was no written agreement covering the terms of any subcontracting or assignment of this contract.[4] Similarly, Moran testified there was no written agreement with respect to the price to be paid to Alcoa by Cupples for the metal. (R. 252).

The sufficiency and reliability of any such statement concerning profitability could have been and would have been appraised with the benefit of questioning of Mr. Moran and other Cupples personnel who were called to testify, had Lupton been permitted to intervene, for the existence of such a statement would then have been a discoverable fact.

The allegation that appellant "never questioned Cupple's president, [Moran], concerning the profitability

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[4] Q. "Now with respect to the arrangements between Alcoa and Cupples, Cupples being subcontractor under the bid submitted by Alcoa, are these arrangements incorporated in any written agreement?"

A. "Well there has never been any decision on that. They have had some ideas on it and we have, but it has never been defined." (Moran—R. 251-252).

of the contract, although it was aware of counsel's representation that it would benefit Cupples . . ." (page 12 Government's Motion), mistakes the role of the Government as representative of the public interest. As pointed out on pages 19 and 20 of Lupton's Jurisdictional Statement, the question of profitability of such a contract to Cupples, as well as the details of any assignment which Alcoa, the Justice Department and the Port Authority contemplated were avoided by the Judge during the hearing as apparently unnecessary inquiries. Counsel for Lupton had agreed that such matters, in light of Alcoa-Cupples objections, could be disclosed to the Court and Counsel for the Department of Justice for their benefit alone for purposes of the hearing on Lupton's motion to intervene. (R. 252-253). It should be added that the District Court stated in the early part of the hearing that "Well, the two of you [counsel for Alcoa and the Government] can handle this [commitments made by Alcoa to the Government] any way you want to handle it as far as the Court is concerned. It is up to you." (R. 211).[5] When counsel for Lupton made the above referred to request the Court replied, "Well, if the Court desires or needs it, he will get it." (R. 253). The matter was never introduced thereafter in the record.

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[5] The Government virtually ignores Lupton's argument that in the Department's opposition to Alcoa's petition for a further extension of time in which to accomplish divestiture it admitted "that it was misled into believing that the award of a Port Authority contract to Alcoa-Cupples would promote divestiture of Cupples." (Jurisdictional Statement, p. 17.) The response to this assertion is relegated to a footnote,". . . the contract *might* enhance Cupples saleability, thus serving the ultimate purpose of the decree. We still believe this." (Government's Motion, page 12, footnote 7). (Emphasis added.)

Lupton can hardly be scored for any lack of diligence by the Government, when it was within the undisputed power of Government counsel to require counsel for Alcoa-Cupples to disclose these matters to the Court and did not do so. Lupton was only an applicant for intervention, and could not compel such disclosure. In addition, it was primarily the Government's duty to show that the Port Authority contract would be profitable to Cupples, especially where there existed a history of a steady loss of money coupled with the power of Alcoa to make a profit on the metal it supplied Cupples.

Alcoa, to support its motion, refers to the plan of divestiture ordered by the Court. (Alcoa-Cupples' Motion, p. 4). This provided that such sale was to be to a person "not disapproved by the Court . . . [and] at a price and upon terms to be approved by the Court." (Government's Motion, Appendix B, p. 21). Alcoa, however, offers no explanation why it continually turned down offers to purchase Cupples without calling them to the attention of the Court. Why the Government did not bring to the Court's attention this course of conduct by Alcoa does not appear. It should be noted that neither the Government nor Alcoa refers to that portion of the plan of divestiture which states "[u]pon petition of the plaintiff, the Court may be asked to determine whether any such offer [one not accepted by Alcoa] must be accepted by Alcoa under the provisions of the Final Judgment and this Plan of Divestiture." (Government's Motion, Appendix B, p. 22, para. 7 of the Plan of Divestiture). The fact that Alcoa was able to turn down uninhibited an offer to purchase Cupples on January 11, 1967 on the eve of Lupton's motion to intervene is yet another example of the Government's lack of a diligent policing of this

decree and of adequate representation of the public interest.

Alcoa, unlike the Government, criticizes Lupton's President when he testified that the divestiture of Cupples would be adversely affected by the Port Authority contract. Among other things the contract between Alcoa and Cupples relating to the assignment of the Port Authority Contract, we claimed, would be subject to reformation. Alcoa stated that only certain contracts would be subject to reformation and that the Port Authority contract was not one of them. See also Appendix A of this Opposition, Letter dated February 6, 1967 from Hickman to the president of Certainteed Products Company.)[6] The Government states categorically "... that any purchaser of Cupples could seek reformation of any unfulfilled Alcoa-Cupples contract on the ground it had been entered into improvidently."[7] (See page 5 of Government's Motion.) This is yet another example of an unsolved and unprobed matter before the District Court.

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[6] Counsel for Alcoa, in his statement to the Court on January 12, 1967, declared "[w]e did not agree to the reformation of that [Port Authority] contract, and the Department did not ask us to agree to the reformation of that contract." (R. 220).

[7] The "MEMORANDUM OF THE U.S. IN RESPONSE TO THE MOTIONS OF LUPTON MANUFACTURING COMPANY" submitted to the trial court represented: "[T]he Government has received commitments from Alcoa designed to prevent the contract from standing in the way of divestiture of Cupples; in addition, Alcoa agrees that the purchaser of Cupples would have the right to ask the Court for reformation of contracts between Alcoa and Cupples if these were improvidently entered into." (R. 187).

II.

Lupton's Interest as an Intervenor

In the recent decision of *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.* 386 U.S. 129, this Court vindicated the right of an intervenor under the amended provisions of Rule 24(a) to protect its interest and the public interest in promoting and insuring that there would be a restoration of competitive conditions. It was not the character of Cascade as a customer but its interest in restoration of competitive conditions which is at the core of the decision. Such is Lupton's interest. This is why Lupton has persevered in prosecuting its right to intervene irrespective of the fact that the Port Authority contract has been awarded to Alcoa.

Both the Government and Alcoa-Cupples present the argument that this appeal must be dismissed because of the absence of any mandate of this Court upon which Appellant can rely. Appellant recognizes that the only issue which was appealed to this Court in the case in chief was whether Alcoa should be required to divest itself of the Corona Plant.[8]

However, it seems manifest that any argument concerning the necessity of a mandate of this Court as a prerequisite to support intervention is merely an attempt to sterilize the modification of Rule 24(a) as construed by the Supreme Court by a stylistic literal interpretation of the *Cascade* decision.

Thus, the primary thrust of the *Cascade* decision *supra,* must be viewed as providing that intervention

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[8] Alcoa left the remaining issues unappealed and hence these issues became *res judicata* and the law of the case.

was to be allowed to promote timely and effective divestiture and to guard against any further frustration of divestiture. It is not a fact as Alcoa alleges that "... appellant's private interest in this case is in the establishment of a weak Cupples." (Page 10 of Alcoa-Cupples' Motion). Appellant's interest is rather to insure an independant Cupples, and to guard against a resulting company which would be Alcoa in the guise of Cupples.

CONCLUSION

In view of the foregoing we respectfully urge that the motions to dismiss be denied and that probable jurisdiction be noted in order that the questions presented by this appeal may be resolved.

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APPENDIX A

(Exhibit number one to "DEFENDANTS' OPPOSITION TO GOVERNMENT'S PETITION FOR MODIFICATION OF FINAL JUDGMENT," served on Counsel for the Government May 19, 1967.)

EXHIBIT 1

February 6, 1967

Mr. Malcolm Meyer, President,
Certain-teed Products Corporation,
120 East Lancaster Avenue,
Ardmore, Pennsylvania 19003.

Re: Cupples Products Corporation

Dear Mr. Meyer:

Following-up our telephone conversation of this morning, I enclose the year-end data on the captioned company. You will notice that the company did significantly better in the year just ended, although it still lost money. However, these losses need to be evaluated in the light of non-recurring factors. For example, you will notice that more than $800,000 was lost in June and July. During this sixty-day period, all Cupples' operations were closed by a strike which resulted in a very satisfactory labor contract with the United Steel Workers. The Corona operation was closed as of the year-end so that the $363,000 lost at that site need not be repeated. Some $280,000 was lost at Dowagiac but we believe that this operation can be turned into a profitable one if the Dowagiac facilities are moved to St. Louis, as we are planning. During the first six months of 1966, Cupples carried an interest bearing obligation to Alcoa in the sum of $16,000,000 and during the last six months an obligation of $12,000,000. As a result, operations were charged with a $676,000 interest payment to Alcoa. We capitalized that debt at year-end and, presumably, the interest charge would not be a recurring one if you were to acquire the property.

The extent to which the uncertainties inherent in the sale of a property result in low employee morale is hard to measure, but is certainly there. Likewise, if the present management could put the antitrust litigation and the Corona misadventure behind them and concentrate on business in St. Louis, I am sure they could add immeasurably to the success of the company.

I am sure you know that Alcoa was awarded the curtain wall contract on the World Trade Center and that the contract will be assigned to Cupples. The Department of Justice questioned our right to proceed in that manner but ultimately acquiesced.

In connection with those discussions with the Department, we made another commitment which I am required to bring to your attention. It is to the effect that any Court approved purchaser of Cupples shall have the right to seek Court reformation of the terms and conditions of any unfulfilled contract entered into between Alcoa and Cupples prior to the date of the divestiture, reformation to be on the ground that such contract was improvidently entered into in the light of the facts as they existed at the time such contract was executed. The assignment to Cupples of Alcoa's soon-to-be realized contract with the World Trade Center is an exception to that commitment.

We know of no contract between Alcoa and Cupples to which such reformation could apply. But, for what it is worth, you have the assurance that the Department requires us to give. We would propose to include it in any contract with a purchaser.

Mr. Moran or I will be glad to discuss with you the details of the World Trade Center contract if you become seriously interested in acquiring Cupples. We believe it to be an asset of great value. Along the same line, I enclose a list of Cupples' forward business on contracts over $50,000. Insofar as these contracts involve products other

than those manufactured by Cupples, they are covered by subcontracts.

As we agreed by phone, I shall be glad to meet you at any mutually agreeable time and place after you have digested the data enclosed with this letter.

With cordial regards, I am

Sincerely,

/s/ LEON E. HICKMAN

LEH/jws
Enc.
bc: Mr. C. C. Moran

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LUPTON MANUFACTURING CO. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 1296. Decided June 12, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed.